Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-6853

ALTON JAMES HENDERSON, Petitioner	In Forma Pauperis
V.	From North Carolina
STATE OF NORTH CAROLINA, Respondent	State Court Decision

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF NORTH CAROLINA .

APPEARANCES

We, and each of us, hereby enter appearance in this Court in this cause on behalf of, and as counsel for, Petitioner, Alton James Henderson.

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[redacted]

CERTIFICATE

This is to certify that the attached Petition for Certiorari, along with In Forma Pauperis Petition and Affidavit, were this day served upon all parties hereto by depositing three copies of the same in a United States Postal Service mailbox, with first class postage prepaid, addressed to counsel of record for the respondent, viz., Attorney General of the State of North Carolina.

This 7th day of June 1974.

W. R. Dalton, Jr.
Attorney for Petitioner

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State Court Opinions attached:
- State v. Henderson
- State v. Jarrette
- State v. Waddell
- State v. Britt

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TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes your Petitioner, the defendant below, who respectfully shows unto the Court as follows and respectfully petitions the Court that a Writ of Certiorari issue to the end that the judgment and opinion of the Supreme Court of North Carolina, hereinafter described, be reviewed by the Supreme Court of the United States:

WHERE OPINION REPORTED

The Opinion is reported as STATE OF NORTH CAROLINA VS. ALTON JAMES HENDERSON in _____NC_____, 203 SE2d 10. The companion cases, the opinions of which were adopted by reference, are reported as STATE OF NORTH CAROLINA V. JARRETTE, _____NC _____, 202 SE2d 721, and STATE OF NORTH CAROLINA V. WADDELL, _____NC_____, 194 SE2d 19. Copies of said opinions are attached.

JURISDICTIONAL GROUNDS

1. Under North Carolina practice the decision and the opinion are the same document, and the date of said document is 13 March 1974 and that is the date of entry.

2. The statutory provision believed to confer jurisdiction is 28 USCA Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Where defendant refuses to answer questions without a lawyer present, and he is exhibited singly less than twelve hours later before the victim in the presence of the District Attorney, with no lawyer present for the defendant, does the fact that the exhibition occurred prior to issuance of a warrant make such confrontation constitutionally permissible under the Sixth and Fourteenth Amendments?

2. Where defendant attacks an at-trial identification because of improper out-of-court confrontation, and neither side at voir dire offers evidence as to the hour when the Warrant of Arrest was issued, but the record shows it was issued the same day as the out-of-court confrontation, and it further appears that there had been no prior identification, and the trial judge makes no findings of fact on the point, does KIRBY V. ILLINOIS 406 US 682 permit the adoption of arule that there is a presumption the confrontation preceded the issuance of the warrant and thereby preceded the commencement of adversary proceedings?

3. When the show-up occurs after the date of STOVAL V. DENNO, 388 US 293 and the defendant is and has been in custody and the victim is a local resident locally employed and there has been no reason advanced as to why a delay for a line-up would prejudice the State, is the use of a "show-up" instead of a line-up constitutionally permissible under the Due Process Clause of the Fourteenth Amendment?

4. When an out-of-court identification is tainted, and the trial judge finds that the in-court identification can be separated from it, can a State

Appellate Court constitutionally apply the local rule of evidence that such findings cannot be attacked if "supported by competent evidence" or does the case of UNITED STATES V. WADE, 388 US 212 apply to the State as well as Federal cases and require that the trial court findings be supported by "clear and convincing" evidence?

5. Can the evidence be "clear and convincing" within the meaning of UNITED STATES V. WADE, 388 US 212 (and can the rule of NEIL V. BIGGERS, 409 US 188 requiring indicia of reliability under the totality of circumstances be met) when the victim admitted that she hesitated for "five minutes" before identifying defendant at a single exhibition because it took that long for her to be sure, and the undisputed evidence also shows:

   a. There was no light burning in the room where she saw the attacker.

   b. That although the defendant lived two or three trailers from the victim, and she had seen him about fifteen times before at a distance, she did not recognize him at the time.

   c. That the outside light was not bright enough for her to distinguish the color of the attacker's clothes or the kind of collar he was wearing.

   d. That she uses glasses which she did not have on at the time.

   e. The prosecuting attorney was present at the show-up and the defendant was without counsel when the police brought the defendant before the victim and said "Is that the man?"

   f. A written statement given the police by the victim immediately after the attack and while the police were looking for the attacker contains no description of the attacker.

6. Is the penalty of death a cruel and unusual punishment within the prohibition of the Eighth and Fourteenth Amendments when it is imposed (a) upon a defendant convicted of rape or burglary, or (b) upon such a defendant in a case where the victim suffered only transitory injuries in the form of a knot over her right eye, a bruise over each eye, a swollen lip, and red marks on her throat?

7. Where mandatory death sentence statutes enacted in 1868 were amended in 1949 by other statutes providing that life imprisonment shall be the sentence if the jury in its unbridled discretion so recommends, do the Eighth and Fourteenth Amendments (as interpreted by FURMAN V. GEORGIA, 408 US 238) require that the discretionary proviso rather than the mandatory death sentence provision must fall?

8. Where data susceptible to judicial notice show that during a twelve month period in North Carolina slightly more than 13 people were tried for capital offense Rape and that during a corresponding but earlier period of twelve months there were 738 Rape offenses reported in the State, and the law of North Carolina gives the prosecution absolute discretion, free from supervision of any court or administrator, to

   a. refuse to submit a capital bill to the grand jury.
   b. ask for an indictment charging a lesser offense.
   c. try the accused for a lesser included offense only.

   is such a showing sufficient to establish a constitutional impediment under the Eighth and Fourteenth Amendments to the use of death sentences for Rape in North Carolina unless and until judicial control over such discretion is established?

9. Where data susceptible to judicial notice show that during the year 1972 there were only 10 convictions for first degree burglary in North Carolina but that 39,210 burglaries and housebreakings were reported during the same year, and the law of North Carolina gives the prosecution absolute discretion, as aforesaid, is such a showing sufficient to establish a constitutional impediment under the Eighth and Fourteenth Amendments to the use of death sentences for Burglary in North Carolina unless and until judicial control over such discretion is established?

10. If capricious or discriminatory exercise of discretion by District Attorney must be established by proof of actual examples in order to invoke the constitutional ban against cruel and unusual punishment contained in the Eighth and Fourteenth Amendments, do the cases of ASHTON V. KENTUCKY, 384 US 195 and UNITED STATES V. EVANS, 333 US 483, require that the defendant be relieved of such a burden and that it be placed upon the State?

11. Does the Due Process Clause of the Fourteenth Amendment or the Jury Trial Provision of the Sixth Amendment permit a State court death sentence to be predicated upon a verdict rendered by a jury which did not know for certain that the consequences of a guilty verdict was a sentence of death and a request for this information was denied?

12. Do the Eighth and Fourteenth Amendments, as interpreted by FURMAN V. GEORGIA, 408 US 238, in order to prevent covert exercise of discretion in favor of the accused, required that the trial court refrain from informing the jury that a guilty verdict means a death sentence, even when the information is requested?

13. Do the Equal Protection of Law and Due Process Clauses of the Fourteenth Amendment prohibit the adoption and use in capital cases in State courts of a rule of practice which denies a defendant who asserts an alibi (but is inapplicable to defendants who do not) the right to rely on the weakness of the State's evidence concerning corpus delicto and the right to have the jury charged concerning lesser included offenses

14. When the police remove from defendant's clothing two long blond hairs, apparently the same or similar color as the hair of the victim and

also of defendant's daughter, and the prosecution introduces the hairs in evidence and argues that they belong to the victim, was the failure of the prosecution in a capital case to have the hairs microscopically compared with the hairs of the victim unconstitutional "suppression of evidence" within the meaning of the Fair Trial requirement of the Due Process Clause of the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> "Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death. Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." (GS 14-21)

> "Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death; Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's prison for life, or for a term of years, in the discretion of the Court." (GS 14-52)

STATEMENT OF THE CASE

Petitioner was tried for both Rape and First Degree Burglary in a State Court of North Carolina. There was a verdict of guilty in both cases (R. p. 12), and a sentence of death by asphyxiation of gas was pronounced. (R. p. 13). Petitioner appealed to the Supreme Court of North Carolina and the judgment was affirmed on 13 March 1974.

On 25 March 1974 the Hon. William H. Bobbitt, Chief Justice of the Supreme Court of North Carolina, stayed execution of the judgment pending further orders of the court in order to give Petitioner an opportunity to file a petition for a Writ of Certiorari in this Court.

1. Material Facts.

The prosecuting witness lived in a trailer. About 10:30 P. M. she was awakened by a barking dog. She looked up and saw an intruder standing in the door of the bedroom. There was no light burning in the bedroom, but some light did enter from an adjoining room and from the outside. The intruder used force upon her and accomplished sexual connection. No weapon was used and no permanent injury was inflicted. There was no evidence of damage to the genital area and a medical report (not introduced in evidence) states that the doctor found "no signs of forced entry." There were bruises over both eyes, a knot over one eye, and red marks around her throat.

The prosecuting witness admitted that she eventually submitted to the attacker and that she chatted with him amiably for thirty minutes after the event. She did not state that she submitted from either fear or exhaustion, and the defendant claimed on appeal that a case of rape had not been made out. The Supreme Court of North Carolina held that the jury could infer fear from the nature of the violence. The defendant made a second contention that the jury could infer absence of fear from failure to so testify and that consequently a lesser included offense should have been submitted to the jury. The Supreme Court of North Carolina held that by asserting an alibi the defendant could not rely on the weakness of the State's case as to the "corpus delicti", and cannot complain because the Court did not submit a lesser included offense to the jury.

The prosecuting witness testified that all the doors were locked. She predicated this testimony, not upon actual recollection, but upon the fact that

it was her invariable habit to always lock all doors, because she had a phobia about unlocked doors. However, sheha d not retired for the night but was lying on top of the bed in a robe preliminary to going into the kitchen when she feil asleep. The investigating officer reported no evidence of force being applied to the doors or the locks, and the prosecuting witness noticed no such signs when she used the doors after the event. The Supreme Court cf North Carolina held that thus testimony was sufficient to support a finding by the jury that all the doors were closed. To the contention of defendant that absence of signs of force was sufficient to support a finding that the victim had overlooked locking at least one door and that at least one of the doors was open and that a lesser included offense should have been submitted to the jury, and the jury should have been instructed that if the defendant entered through an open door there was no "breaking", the Supreme Court of North Carolina again held that by asserting an alibi the defendant could not rely on the weakness of the State's case in regard to the corpus delicti.

Although the defendant lived only three doors away from the prosecuting witness, and had seen him from a distance ten or fifteen times before, she did not recognize him as her assailant. He was arrested because of his prior record and because his car was seen passing the vicinity right after the attack. After his arrest he was read the Miranda warning and refused to answer questions without a lawyer present. Questioning desisted but his clothes were examined and two long blond hairs found were introduced in evidence and argument was made to the jury that they belonged to the prosecuting witness. Defendant claimed they belonged to his daughter. No microscopic comparison was introduced in evidence. The Supreme Court of North Carolina held that failure to use microscopic comparison as evidence was not "suppression of evidence" within the meaning of the fair trial requirement of the Due Process Clause.

Less than 12 hours later the defendant, while still in jail, was presented singly to the prosecuting witness. No other people, except police officers and the District Attorney, were present. The witness looked at the defendant for "five minutes" before responding. Finally she identified him. She testified the delay on her part was caused by a feeling "I had to be sure."

On the same day as the out-of-court identification there was a warrant issued against the defendant. The record does not show whether this warrant was issued before or after the "show-up". The Supreme Court of North Carolina held that there is an inference that the warrant followed the show-up because there had been no prior identification and that, consequently, the burden was on the defendant to dispel the ambiguity and show that a charge was pending at the time of the show-up.

The record shows that the witness lives in the county, works in the County, and so remained from time of attack to time of trial. No reason was advanced as to why a "line-up" could not have been arranged. The Supreme Court of North Carolina held that these facts made it a close question of law as to whether or not a "show-up" was unconstitutional, but stated that it was not necessary to decide the question because the trial court found that the two confrontations could be disassociated from each other. The Supreme Court of North Carolina rejected defendant's contentions that such a finding had to be supported by "clear and convincing" evidence and held that the finding was binding on appeal if supported by "competent" evidence.

The Supreme Court of North Carolina held that the in-court identification, notwithstanding a prior possibly illegal out-of-court identification, nevertheless met the reliability requirements of NEIL V. BIGGERS and could be dissassociated because:

a. The witness testified at the trial that she was positive and would "not ever forget" the face that she saw that night.

b. There were three electric lights and a moon outside the trailer, and the witness testified "there was plenty of light for me to recognize the face that I saw."

c. She saw him for about an hour, and talked with him for about 30 or 35 minutes after the attack.

d. She testified that during this hour she observed him very closely so that she would be able to identify him later.

e. She testified that he had a distinctive hair-line, thin face, fine lips and dark hair, and that her identification was based not upon the "show-up" but upon his "hair-line, length of hair, eyebrows and lips".

f. She had identified no other person previously.

g. The identification occurred less than 12 hours after the attack.

The indicia relied upon by the Supreme Court of North Carolina (except for #3, #6 and #7) all fall within the category that Mr. Justice Powell calls "self-serving", and none of these indicia are directed to the question of why the witness, so sure at the trial, was not equally sure at the time the defendant was suggested to her at the show-up.

The defendant contended that the in-court identification did not meet the reliability requirements of NEIL V. BIGGERS, 409 US 188, 34 Led 2d 401, and that there was no "clear and convincing" evidence within the meaning of UNITED STATES V. WADE, 388 US 212, 18, Led 2d 1149.

In support thereof the record shows:

a. When the witness first saw defendant she hesitated for "five minutes" before identifying him because she wanted to be sure.

b. The witness lives only three doors from defendant, was on visiting terms with his wife, had seen him about 15 times from a distance, but did not recognize him as being her attacker at the time.

c. The light in the room of the attack:

(1) All came from outside sources.

(2) Was too poor to discern color of attacker's clothes.

(3) Was to poor to describe nature of attacker's shirt except that it was buttoned down the front and had short sleeves.

d. Immediately after the attack, before anybody had been arrested, and when it was in the interests of the police to find the attacker, the police took a written statement from the witness. NO WHERE IN THE STATEMENT IS THERE ANY DESCRIPTION OF THE ATTACKER'S FEATURES OR HIS CLOTHES.

e. For the following four hours the police continued to question the witness. But the testimony of the officers concerning prior consistant statements of the witness contains no indication whatever the witness was able to describe the attacker before the "show-up".

During the trial the jury broke their deliberations, returned to the courtroom, and the following colloquy occurred:

THE COURT: I understand the jury has a question?

FOREMAN: Yes, sir, we would like further instructions regarding punishment and whether or not we can make a recommendation.

THE COURT: First of all, I will instruct you that the penalty to be imposed is really not your concern. Your function is to pass on the guilt or not guilty asto both counts. So, I will not instruct you on what the penalty will be; that is not a concern of yours. As far as the recommendation is concerned, you cannot make a recommendation. You will find him guilty or not guilty, according to the evidence and the instructions I have given you.

The Supreme Court of North Carolina held that refusal to honor the above request was not constitutional error. The decision was probably predicated upon the contention of the Attorney General that ignorance had to be enforced as a consequence of STATE V. WADDELL, 282 NC 431, 194 SE 2d 19, which was based on FURMAN V. GEORGIA,

> "In short we would be returning to the pre-Waddell phase of our law by returning discretion to the jurors by allowing them to return a verdict of not guilty when they did not feel the death penalty should be imposed."

That is, the Attorney General contended that FURMAN V. GEORGIA prevented sub rosa exercise of discretion by a jury just as much as overt exercise of discretion. The Supreme Court of North Carolina upheld this result.

The Supreme Court of North Carlina in rendering STATE V. WADDELL had held that the decision was made obligatory by FURMAN V. GEORGIA.

That is, held that FURMAN V. GEORGIA required, pending legislative action, not that the death sentence be suspended but that the death sentence be made mandatory. Consequently, there is a real basis for assuming that the decision on this point was rendered in the belief that it was required by FURMAN V. GEORGIA; rendered in the belief that if the trial judge had honored the request of the jury, and it had been approved on appeal, then death sentences in North Carolina would again be subject to attack under FURMAN V. GEORGIA on the ground that jury discretion was being encouraged by State action.

2. Manner in which Federal Questions were Raised.

(Question No. 1)

Earlier Refusal of prisoner to answer questions, and presence of District Attorney at show-up, entitled prisoner to counsel and forbade identification testimoney in absence of such counsel, notwithstanding no warrant had issued.

a. In the trial court.

At trial defendant objected to in-court identification because of impermissible out-of-court confrontation. After the voir dire and adverse ruling defendant Excepted. The objections appear on pages 17 and 23 of the record on appeal; the exceptions appear on pages 22 and 23 of the record. Assignments of Errors are Nos. 3, 4 and 5 on page 71 of the record. Under North Carolina practice this presents for review all constitutional questions involved.

b. In the Brief.

"The record shows that when the police commenced to interrogate the defendant he objected because he did not have a lawyer present, having been advised of his right to counsel before answering questions. (R. p. 45). That is, the defendant made manifest that he wanted counsel if counsel would be of benefit to him. Nevertheless he was taken to the 'show-up' without counsel." (Brief p. 20)

"In this case the District Attorney was present at the time thereby demonstrating to the witness that the prosecution had sing led on the defendant as the culprit." (Brief p. 22)

c. In the Opinion:

"It is therefore reasonable to infer that the warrant was served after the confrontation at the Sheriff's Department, and that at the time of confrontation the proceeding was investigatory rather than accusatory. Thus the proceeding had not reached the critical stage which required presence of counsel for defendant." (p. 17)

(Question No. 2)

KIRBY V. ILLINOIS requires that the burden of showing existence or non-existence of adversary proceedings at the time of confrontation be placed upon the State and not the Defendant.

a. In the trial court: Not applicable. Appellate practice involved only.

b. In the Record on Appeal: Assignments of Error Nos. 3, 4 & 5.

c. In the Brief: Not applicable. Error occurred in the Opinion. But see following from Brief:

"The record shows that the warrant was issued on the same day that the out-of-court identification occurred, and that the latter occurred about 11:00 A. M. in the morning. (R. p. 3, 19). The record does not show at what hour the Complaint for arrest was filed. Nevertheless, it has been expressly held in this State that the burden of proof is on the State to show that all steps which are necessary to make the identification admissible were taken." (citing STATE V. WILLIAMS, 274 NC 328, 163 SE2d 253)

d. In the Opinion:

"The record does not indicate that any adversary judicial criminal proceedings had been initiated against defendant prior to the confrontation. The record does show that a warrant was served on defendant on the same day. There had been no previous identification of defendant. It is therefore reasonable to infer that the warrant was served after the confrontation at the Sheriff's department, and that at the time of the confrontation the proceeding was investigatory rather than accusatory. Thus the proceeding had not reached the critical stage which required the presence of counsel for the defendant." (p. 17)

(Question No. 3)

The Show-up was after STOVALL V. DENNO, 388 US 293, and the State would not have been prejudiced by a delay for a line-up.

a. In the Trial Court: Objections appear on pages 17 and 22 of the record on appeal. Exceptions to the rulings appear on pages 22 and 23.

b. In the Record on Appeal: Assignments of Error Nos. 3, 4 and 5 (R. p. 71)

c. In the Brief:

"It was further held in STOVALL V. DENNO, 388 US 293, 18 Led 2d 1119 and NEIL V. BIGGERS, 409 US 188, 34 Led 2d 401, that even though a confrontation be suggestive, it is not constitutionally fatal unless it was unnecessary -- that is, it is not fatal if it can be shown that to delay would have prejudiced the prosecution." (21)

"This confrontation, of course, occurred after STOVALL and the requirement of necessity is still in force." (21)

"There is nothing in the record to show any reason why delay could not have been had to assemble a line-up. Defendant was in jail and could not escape. The prosecuting witness was a resident of the county, employed in the county and remained in the county until the trial." (21)

d. In the Opinion:

"Here the fact that the single exhibition of defendant was held within a short time and as soon as feasible after the assault when the prosecuting witness had the opportunity to closely observe her assailant is counter-balanced by the fact that the defendant was in custody under circumstances which would have easily permitted the formation of a line-up. However, the facts of this case do not require a decision of this question....." (The Court then went on to state that decision was not necessary because the in-court identification could be disassociated from the show-up).

(Question No. 4)

The "Clear and Convincing Evidence" requirement of UNITED STATES V. WADE also applies to State Court trials.

a. In the Trial Court: Not applicable. Appellate practice involved only.

b. In the Record on Appeal:

Assignment of Error No. 5 on page 71 of the record reads as follows:

"5. That his Honor erred in ruling that the identification of defendant by witness was not tainted by any suggestions received at an earlier confrontation of the defendant and the witness, as shown by EXCEPTION NO. 5 (R. p. 23)

c. In the Brief:

"Although his Honor held that the State had carried the burden of disassociating the in-court from the out-of-court identification, there is no clear and convincing evidence to support this finding. (U. S. WADE, 388 US 212, 18 Led 2d 1149 at pages 1164, 1169, 1171). In fact, there is no evidence at all." (p. 23)

d. In the Opinion:

"When the admissibility of in-court identification testimony is challenged on the ground that it is tainted by out-of-court identification(s) made under circumstances constitutionally impermissible, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence they are conclusive upon appellate courts." (p. 19) (italics added)

(Question No. 5)

The evidence below was not clear and convincing and did not establish that the in-court identification was reliable.

a. In Trial Court: Objections appear on pages 17 and 22 of the Record on Appeal. Exceptions appear on page 22.

b. In the Record on Appeal: Assignment of Error No. 5 (R. p. 71)

c. In the Brief:

"Although his Honor held that the State had carried the burden of disassociating the in-court from the out-of-court identification, there is no 'clear and convincing' evidence to support this finding. (U. S. V. WADE, 388 US 212, 18 Led 2d 1149 at 1164, 1169, 1171)" (23)

d. In the Opinion:

"The Court's findings on the critical facts were amply supported by competent evidence, and are therefore conclusive on this court." (19) (Italics added)

"We hold that under the totality of the circumstances the in-court identification of defendant was not tainted by the out-of-court confrontation." (19)

(Question No. 6)

Death for Burglary or Rape is unconstitutional per se.

a. In Trial Court:

THE COURT: Do you want to take exception to the imposition of this sentence on the grounds that it is contrary to the Eighth Amendment to the United States Constitution in that it is cruel and unusual punishment?"

ANSWER: Yes, sir." (R. p. 68)

b. In the Record on Appeal:

In the Assignment of Error on p. 74 of the Record appears the following:

"25. That his Honor erred in imposing a sentence of death for offenses none of which involved death or serious injury to another person, thereby violating the cruel and unusual punishment provision of the United States Constitution, as shown by EXCEPTION NO. 27 (R. p. 68)

c. In the Brief:

"Death for Burglary and non-injurious Rape is cruel and Unusual Punishment Per se." (p. 46)

d. In the Opinion:

"We have again carefully considered all of the arguments which were forecefully presentedby the defendant's counsel. However, we do not find them sufficiently persuasive to warrant disturbing the holdings in WADDELL and JARRETTE." (p. 27)

e. In Companion case of STATE OF NORTH CAROLINA V. JARRETTE: (202 SE2d 721)

"It is thus quite clear, both throughout North Carolina and throughout the nation, that there is a widespread opinion that the death penalty is the appropriate punishment for certain crimes. We do not accept the pronouncement by the amicus curiae that this widespread opinion, held by legislators, judges and jurors, is 'unenlightened.'" (p. 746)

(Question No. 7)

North Carolina Court felt compelled by FURMAN V. GEORGIA to strike the jury discretion provision of the statute and retain the death sentence provision.

a. In Trial Court:

THE COURT: Do you want to take exception to the imposition of this sentence on the grounds that it is contrary to the Eighth Amendment to the United States Constitution in that it is cruel and unusual punishment?

ANSWER: Yes, sir. (R. p. 68)

b. In the Record on Appeal:

Assignment of Error No. 25 (R. p. 74)

c. In the Brief:

"An amicus curiae brief filed by the North Carolina Civil Liberties Union Legal Foundation, Inc. (NCCLU) urged that judicial substitution of a 'mandatory' death penalty for the discretionary death penalty enacted by the General Assembly was (1) an improper application of the FURMAN holding. . . ." (p. 37)

"The Court in BLACKMON declined to review the question raised by the NCCLU amicus curiae brief because BLACKMON, like WADDELL, was not himself under an enforceable sentence of death. In that context, it observed that 'no persuasive reason appeared why the WADDELL opinion should be disturbed' (STATE V. BLACKMON); but it did not preclude reconsideration of WADDELL in an appropriate case." (p. 37)

"Appellant submits that the present appeal is an appropriate case for reconsideration of the severability question." (R. p. 37)

d. In the Opinion:

"In JARRETTE the Court re-affirmed the holding in WADDELL and answered all the viable contentions presented by defendant's brief and argument concerning the death penalty." (p. 27)

e. In Companion Case of STATE OF NORTH CAROLINA V. JARRETTE: (202 SE2d 721)

"The question was therefore presented, as a result of FURMAN V. GEORGIA, what part of GS 14-17 (murder) and what part of GS 14-21 (rape), if any, remains the law of North Carolina. That question came before this Court and was determined by us in State v. Waddell." (p. 740)

"The equal protection Clause. . . makes no distinction between sentences of death and sentences to imprisonment. . . If the existence of these discretionary powers makes the imposition of the death penalty unconstitutional, it would also make unconstitutional all prison terms, no matter how long or short." (p. 743)

"Having given full consideration to the brief and oral argument of the defendant and to the brief of the amicus curiae, requesting us to reconsider State v. Waddell, we now reaffirm that decision..." (p. 740)

f. In the Companion case of STATE OF NORTH CAROLINA V. WADDELL: (194 SE2d 19)

"It is the proviso, and the proviso alone, which creates the discretionary difficulty condemned by the FURMAN decision; and it is quite clear that FURMAN strikes down the proviso." (p. 27)

"This (the proviso), and only this, is what Furman condemns as violative of the Eighth and Fourteenth Amendments." (p. 28)

Mr. Justice Higgins, however, did not see it as quite clear that FURMAN strikes down the proviso. In his WADDELL Concurring Opinion appears the following:

"This holding seem to be required in order that the Court may dig itself out of the hole it fell into by its holding that Furman 'strikes down the proviso as violative of the Eighth and Fourteenth Amendments.' Furman as I understand it.... strikes down the death penalty." (p. 44) (Italics added)

(Questions No. 8 and No. 9)

Prosecutorial Discretion in North Carolina invalidates death sentences.

a. In Trial Court:

THE COURT: Do you want to take exception to the imposition of sentence on the grounds it is contrary to the Eighth Amendment to the United States in that it is cruel and unusual punishment?

ANSWER: Yes, sir.

b. In the Record on Appeal:

Assignment of Error No. 25 (R. p. 74)

c. In the Brief:

"The administration of Justice in North Carolina causes and permits the death sentence to be imposed contrary to the criteria of FURMAN V. GEORGIA, and thereby imposes cruel and unusual punishment." (p. 46)

(because of)

"3. Prosecutorial Discretion." (p. 50)

"Defendant does not contend that the only remedy for this state of affairs (prosecutorial discretion) is for the Supreme Court to overrule FURMAN V. GEORGIA. Defendant concedes that if judicial control were exercised and the record showed that every decision to spare life were predicated upon difficulties of proof, the requirements of FURMAN V. GEORGIA would be met." (p. 53)

d. In the Opinion:

"We have again carefully considered all of the arguments which were forcefully presented by the defendant's counsel. However, we do not find them sufficiently persuasive to warrant disturbing the holdings in WADDELL and JARRETTE." (p. 27)

e. In Companion Case of STATE OF NORTH CAROLINA V. JARRETTE: (202 SE2d 721)

"To say....that because the Solicitor determines in many cases that he should seek a conviction of a lesser offense, his decision to seek convictions on capital charges in other cases are 'freakish' is a patent absurdity..." (p. 742)

(Question No. 10)

ASHTON V. KENTUCKY, 384 US 195, relieves Defendant of the burden of providing actual examples concerning selective or arbitrary exercise of discretion by the District Attorney.

a. In the Trial Court:

THE COURT: Do you want to take exception to the imposition of sentence on the grounds it is contrary to the Eighth Amendment to the United States Constitution in that it is cruel and unusual punishment?

ANSWER: Yes, sir.

b. In the Record on Appeal:

Assignment of Error No. 25 (R. p. 74)

c. In the Brief:

"It is the contention of the defendant that the case of FURMAN V. GEORGIA put the law into such a state of uncertainty that the death sentence cannot be applied to any offense occurring since that date without violating the Due Process Clauses of both State and Federal Constitutions." (p. 43)

"Defendant concedes that if the legislature hereinafter enacts new, or adopts or otherwise re-enacts the old statutes the

present vagueness will be dissipated. There is a presumption that every statute is constitutional and the public is put on notice that the legislature by such statutes finds that the impediments of FURMAN V. GEORGIA no longer obtain in this State and a transgressor violates at the peril of death. That is, the new statute may or not be constitutional in fact but it is no longer vague. Of course, however, such future statutes cannot operate to save the death sentence imposed on this defendant." (p. 45)

"Defendant complains that he does not have the information necessary to a determination of the above questions." (p. 50) (Re Gubernatorial Discretion)

d. In the Opinion:

"We have again carefully considered all of the arguments which were forcefully presented by defendant's counsel. However, we do not find them sufficiently persuasive to warrant disturbing the holdings in WADDELL and JARRETTE." (p. 27)

e. In Companion Case of STATE V. JARRETTE (202 SE2d 721):

"Arbitrary discrimination cannot be shown from statistical data. It requires, at least, careful study of the records in cases where different results were reached in order to determine whether those differences in result were justified by differences in the facts." (p. 744)

(Question No. 11)

Death Sentence is unconstitutional when jury was not aware that death was mandatory upon conviction and its request for information on the point was denied by the Court.

a. In Trial Court: Not applicable. Under North Carolina law Exceptions to the Charge of the Court can be taken for the first time on appeal. (GS 1-282)

b. In the Record on Appeal:

Assignment of Error No. 22 on page 73 of the record reads as follows:

"22. That his Honor erred in instructing the jury: 'First of all, I will instruct you the penalty to be imposed is really not your concern. Your function is to pass upon the guilt or not guilt as to both counts. So, I will not instruct you on what the penalty will be, that is not a concern of yours.'" (R. p. 73)

c. In the Brief:

"Obviously, there are serious objections, both under the State and Federal Due Process Clauses and the State and Federal provisions

guaranteeing a jury trial, to a procedure where the decision as to whether a man shall live or die is made by persons who do not know the consequences of their decision; and where a juror is put in the position of unknowingly taking the life of another...."

d. In the Opinion:

"We hold that the trial judge properly refused to instruct the jury as to the punishment which would result from a conviction of rape or first degree burglary." (p. 23)

(Question No. 12)

FURMAN V. GEORGIA does not require, in order to prevent covert exercise of discretion by the jury, that the jury not be informed that a verdict of guilty would result in a mandatory death sentence when they request such information.

a. In Trial Court: Not applicable.

b. In Brief of Attorney General:

".....it is apparent that the probable effect of a jury instruction with reference to the death penalty would have the effect of influencing the jury in their determination of guilt or innocence. In short, we would be returning to the pre-Waddell phase of our law by returning discretion to the jurors by allowing them to return a verdict of guilty where they did not feel the death penalty should be imposed." (p. 33)

(NOTE: When Attorney General said "pre-Waddell" he also meant "pre-FURMAN" phase of the law. WADDELL is the North Carolina implementation of FURMAN V. GEORGIA).

c. In the Opinion:

"In WADDELL we said 'The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for instruction by the judge.'" (p. 23)

(Also see: "The punishment to be imposed not being a matter to be determined by the jury, defendant's counsel was not entitled to argue this question to the jury." (STATE V. DILLARD, 203 SE2d 6 at page 9))

(Question No. 13)

Depriving Defendant who asserts alibi of the right to rely on the weakness of the States evidence in a capital case violates the Equal Protection of Laws Clause and Due Process Clause of the Fourteenth Amendment.

a. In the Trial Court: Not applicable. Error first occurred in Opinion.

b. In the Brief and Record: Not applicable. Error first occurred in Opinion.

c. In the Opinion:

(1) RAPE

The defendant had contended that if the victim did not resist to the end, according to the common law he would be guilty of nothing greater than assault with intent to commit rape. The State's evidence shows that the victim and her attacker chatted amiably after the event. It also shows that there was no weapon, there was no evidence of injury to the genital area, and the victim had made the following statement to the police:

> "After I submitted he wasn't as rough. He must have been there at least thirty-five or forty minutes. He asked if he could come back again and I said not." (R. p. 41) (italics added)

At no point in her testimony did the victim state that she submitted by reason of fear. The defendant contended that this evidence of submission and lack of evidence of fear made it a jury question as to whether or not there was capital rape -- whether or not she submitted from fear.

The North Carolina Supreme Court held that the defendant could not rely on absence of testin ony concerning fear but had to have positive evidence of lack of fear because he had asserted an alibi:

> "Here all the evidence shows a completed act of intercourse. Defendant's defense is alibi. There was no evidence to support either of the lesser included offenses." (p. 25) (italics added)

(2) BURGLARY

The victim testified that she locked all of the doors; not from direct recollection but from the fact that such was her custom. The State introduced no evidence of any force being applied to the doors or the locks and the victim noticed no such force. The Defendant contended that absence of signs of force made it a jury question as to whether all the doors had in fact been closed; that consequently a lesser included offense should have been submitted to the jury; and the jury should have been instructed that if a door was open in the slightest there would have been no "breaking" necessary for the capital offense.

In an earlier case the Supreme Court of North Carolina had held that if the State relies on entry through locked doors, and it appears that no force had been applied to the locks or the doors, the case should be dismissed. (STATE V. MADDEN, 212 NC 56, 192 SE2d 859)

The MADDEN case, however, did not involve an alibi. The defendant there introduced no evidence. Consequently, the Supreme Court of North Carolina did not feel constrained by MADDEN, overruled the contentions above set forth, and adopted its previous statement in regard to rape concerning the effect of a claim of alibi.

> "Defendant without assignment of error argues in his Brief that the lesser included offenses of burglary should have been submitted to the jury. This argument must fail by virtue of the same authorities and reasoning upon which we overruled Assignments of Error 32 and 33. (p. 25) (italics added)
>
> "Defendant contends that the trial judge erred by failing to instruct the jury that if a door to the mobile home was open in the slightest degree, entering the trailer through that door would not be a 'breaking' (p. 34).... The record reveals no testimony which indicates that any door of the mobile home was open at the time defendant entered the trailer. Rather the uncontroverted evidence is that all three doors were locked prior to defendant's entry." (p. 24)

(Question No. 14)

Failure to introduce laboratory reports concerning hair and blood is "Suppression of Evidence."

a. In Trial Below: Not raised below.

b. In Record on Appeal:

Assignment of Error No. 23 on page 73 of Record reads as follows:

"23. That his Honor erred in failing to set aside the verdict and in letting the verdict stand when it appeared from the evidence that it was possible for the State to have exonerated the defendant, or conclusively proven his presence, by the simple expedient of having a laboratory examination of the hairs found on the defendant and the blood found on the pillow, as shown by EXCEPTION NO. 25 and EXCEPTION NO. 26 (R. p. 67), and as forbidden by the Due Process Clause of the 14th Amendment to the Constitution of the United States."

c. In the Brief:

"If the hair had been microscopically compared with another hair from the prosecuting witness, the State would have had either (1) conclusive evidence that the defendant was present at the scene, or (2) conclusive evidence that the hair found on his clothing was irrelevant to the case and that it would be improper to argue that it belonged to the prosecuting witness. Further, laboratory comparison of the defendant's blood with that on the bed clothing would have either (1) conclusively proven that the defendant was present at the scene of the attack, or (2) served as evidence tending to show that he was not present. It is the contention of the defendant that the State has a duty to establish the truth whether it hurts or helps the State and that a failure to take reasonable steps to establish the truth of highly pertinent facts deprives the defendant of a fair trial." (p. 34)

d. In the Opinion:

"Police officers are under no duty to take any particular course of action when investigating a crime. Of course, they cannot suppress evidence. . . . They are not required, however, to follow all investigative leads and to secure every possible bit of evidence, and their failure to do so is not prejudicial error." (24)

ARGUMENT

(Question No. 1)

ESCEBEDO V. ILLINOIS and UNITED STATES V. ASH, notwithstanding KIRBY V. ILLINOIS, require that a lawyer be present at a pre-warrant line-up if (1) a lawyer is requested by the prisoner, or (2) the State has its chief legal officer present.

KIRBY V. ILLINOIS, 406 US 682, by its reference to ESCEBEDO, left open for future decision the question of whether a prisoner can be subjected to a line-up without a lawyer if he has asked for one.

Further, the case of UNITED STATES V. ASH, 413 US 300, indicates that if the prosecuting officer for the State is present prisoner's right to counsel then attaches either on the theory that such constitutes an exception to the "adversary proceedings" rule, or on the theory that such presence itself constitutes initiation of "adversary proceedings":

> "at these newly emerging and significant events, the accused was confronted, just as at the trial, by the procedural system, or by his expert adversary, or by both." (p. 310) (italics added).

Defendant concedes that a strong case can be made for the proposition that the burdens, financial and otherwise, placed upon local governmental units by a rule requiring a lawyer for every suspect routinely weeded out of the investigation process, outweigh the benefits to society of having all prisoners properly advised. And, in turn, defendant believes that the State will concede that, if the issuance of a warrant be the sole dividing line, warrants will always be deferred until all line-ups are completed and the requirement of counsel at line-ups will become a dead letter.

Without denying the possibility, upon full argument, of a more general formula which will resolve the above impasse, defendant believes that any eventual rule

will recognize the fact that counsel should be provided to a prisoner if (1) he has requested it, and (2) if the State has its legal officer present.

Prisoners who want a lawyer and who, for that reason or otherwise, attract the personal attention of the chief prosecuting officer for the State, are not mere grist for the elimination mill. Whatever be the commentary upon the wisdom of the public, the fact remains that most innocent people do not wish a lawyer for a line-up, and the one who does labels himself to the police as out of the ordinary, as more than a routine suspect. And, whatever be the commentary upon the diligence of the chief prosecuting officer, the fact remains that he does not personally inspect every derelict caught up in the elimination process, and when he makes a personal appearance the prisoner is more than a routine suspect.

(Question No. 2)

Burden is on State to establish when adversary proceedings began.

Defendant contends that substantive constitutional rights cannot be lost by virtue of procedural rules unless such procedure be reasonable. The record below was silent as to whether the out-of-court confrontation, held on the same day as issuance of the Warrant of Arrest, preceded the warrant or not. The North Carolina court placed the burden of showing that confrontation followed issuance of warrant on the prisoner. Since issuance of a warrant may precede its service by weeks, months, or years, the time of issuance is a matter always and easily within the knowledge of the State and not assuredly in the knowledge of the prisoner. Consequently, the North Carolina Supreme Court did not hold that the burden is automatically on the prisoner. It held that the burden of going forward shifts to the prisoner when it appears that the confrontation was the first one -- held that there is a presumption that the police would never issue a warrant without at least one identification and that consequently the first confrontation is presumed to precede the warrant.

Since time of issuance of the warrant is a routine matter of documentary evidence, a matter of record, with the records in the control of the State, it is not reasonable to leave such matters in the realm of testimony with shifting burdens of going forward with the evidence, etc. Further, even if the presumption be valid as a general proposition, the presumption here was dissipated by the fact that the District Attorney was present. There is an equal presumption that the District Attorney does not take part in police investigations until there has been at least one identification obtained.

(Question No. 3)

The Show-up was constitutionally defective because there was no showing of necessity for dispensing with a line-up.

The Supreme Court of North Carolina conceded that ordinarily, when a defendant is in custody, and the identifying witness has roots in the community, it is not permissible to exhibit the prisoner singly. But the Supreme Court of North Carolina also felt that it could very well be that if the single confrontation be held within a very short time after the offense, while recollection was fresh, a show-up would not be subject to attack. Even so, however, the court below said the question was a close one and left it undecided because of the way it decided Question No. 4.

Since the ruling below poses the possibility of the operation of a rule of law permitting a show-up instead of a line-up if held within a "short time and as soon as feasible after the offense", and since such a rule would have not inconsiderable consequences upon police practices, defendant feels that the question should be authoritatively answered the first suitable time. And defendant feels that this case is a suitable vehicle.

(Question No. 4)

The Clear and Convincing Evidence Rule applies to State cases.

Immediately after UNITED STATES V. WADE, the Supreme Court of North Carolina, in a series of opinions paid service by dicta to the "clear and convincing evidence" rule:

STATE V. WILLIAMS, 163 SE2d 353 at 362 [4]
STATE V. AUSTIN, 172 SE2d 507 at 511
STATE V. MCVAY, 177 SE2d 874 at 877
STATE V. MORRIS, 183 SE2d 634 at 637
STATE V. MCVAY, 183 SE2d 652 at 655
STATE V. CHANCE, 185 SE2d 227 at 237

However, commencing with STATE V. BASS, 186 SE2d 384 at 391 and then in STATE V. TUGGLE, 201 SE2d 884, and finally in this case, we hear nothing more about "clear and convincing evidence." Thenceforth, it is "competent" evidence, not "clear and convincing evidence", which is binding on appellate courts. Nor is this change an inadvertant one with the attention of the court not focused on the distinction. The defendant in his brief and oral argument expressly invoked the "clear and convincing evidence" rule, and the Supreme Court of North Carolina in response made it a point to lay down for the bar and the bench a formal statement of the law applicable -- a statement in which "clear and convincing" is prominent by its absence, and in which "competent" is predominant by its presence.

It seems that at the time of STATE V. BASS (1972) the Supreme Court of North Carolina was of the opinion that this Court was less than happy about its restrictions on out-of-court identifications; that a retrenchment was in the offing; and that the "clear and convincing evidence" rule, stated in a federal and not a state case, was an apt instrumentality for shading, if not emasculating, the prohibitions against single exhibitions and the requirements of right to counsel. That is, this sudden switch was not inadvertent but was in hopes that the prayer

in STATE V. WILLIAMS, 163 SE2d 353 for a new day was about to be answered:

> "be that as it may, the decision of the United States Supreme Court, however erroneous we believe it to be, is binding upon us as an authoritative construction of the United States Constitution. Though we look hopefully for the dawn of a new day, we must, therefore, decide the present case as if we, ourselves, fully concurred..." (p. 361) (italics added).

Defendant is at a loss for a tactful way in which to assess the differences between this Court and that of the Supreme Court of North Carolina, and will, therefore, content himself with suggesting that, no matter the ultimate result, a speedy resolution will serve the public interest. The question is purely one of law, and litigation in the lower federal courts under habeas corpus will not serve to improve clarity, or further define the issues.

If the present restrictions on out-of-court identifications are to remain, the "clear and convincing" rule will have to be enforced. The whole thing now is a ritual. The witness is asked if she bases her testimony on what she saw at the time; she says "yes"; the trial Court so finds; the Appellate Court says such testimony is "competent", lip service has been paid to the Constitution; and everybody is happy except the prisoner.

(Question No. 5)

The Evidence was not clear and convincing and does not demonstrate reliability under the totality of the circumstances.

When evidence for the State shows that the witness was questioned at a time before the show-up when the police did not know the identity of her attacker and nevertheless she left no description of him in their possession; and the evidence further shows that, because of a wish to be sure, she hesitated for "five minutes" before assenting to the person personally tendered her by the District Attorney, it is impossible to make a valid finding that the two identifications can be dissassociated and impossible to hold that the identification is reliable under all the circumstances.

If the witness had stated in open court that she was unsure, and had studied the defendant for "five minutes" before identifying him, no jury would have convicted.

(Question No. 6)

Death for Burglary and Non-injurious Rape is a cruel and unusual punishment per se.

Since this ever-recurring question must eventually be answered, and since the two capital cases here are deemed more venial than other capital crimes, defendant hopes that the Court will feel the best procedure is to attack the problem piecemeal from the lesser to the greater, and that now is the proper time to start.

(Question No. 7)

FURMAN V. GEORGIA did not strike the discretionary proviso and leave the mandatory death sentence intact.

The decision below was predicated upon STATE V. WADDELL 194 SE2d 19 and STATE V. JARRETTE, 202 SE2d 721. And WADDELL, especially the concurring opinion therein of Mr. Justice Higgins, demonstrates clearly that the differences between the majority and minority of the Court stem directly and inevitably from differing interpretations concerning what FURMAN V. GEORGIA requires.

The majority syllogism is as follows:

1. FURMAN V. GEORGIA strikes, not the death sentence provision of the Act of 1868, but the jury discretion proviso of the Act of 1949.
2. Under local law, with the proviso gone, the original statute which makes death mandatory remains inviolate.
3. Consequently, death is now mandatory.

The syllogism of the minority is as follows:

1. FURMAN V. GEORGIA strikes, not the proviso of the act of 1949, but the mandatory death provision of the Act of 1868.

2. Under local law, abolition of death sentences does not absolve the culprit, but reduces his penalty to life imprisonment.

3. Consequently, life imprisonment is now the proper sentence.

In addition, the minority had a fall-back position. Even if FURMAN V. GEORGIA struck the proviso and not the death sentence, under local law death sentences cannot be used because the legislature intended otherwise in 1949 and to return to a death sentence would be to violate the last legislative intent.

The question of whether FURMAN V. GEORGIA strikes the death sentence or the jury discretion proviso is not a matter of semantics. It is a real, life-and-death question. Mr. Justice Lake indicated that he joined the majority because he was of the opinion that FURMAN V. GEORGIA outlawed jury discretion in any kind of case, not merely capital cases, and consequently it was the discretionary proviso which had to fall. (STATE V. JARRETTE, 202 SE2d 721 at 743). If it be the law that FURMAN V. GEORGIA would not prevent juries having unbridled discretion to reduce a life imprisonment sentence to a term of years, it is quite probable that Mr. Justice Lake would join the minority in WADDELL and thereby change the complexion of North Carolina's death row.

(Questions Nos. 8 and 9)

Prosecutorial discretion without judicial supervision prevents use of death penalty.

Defendant reads FURMAN V. GEORGIA as holding that the exercise of discretion as to death (even though exercised in the open and thus subject to a need to justify the decision to one friends and the public), prevents the imposition of a death sentence if the history of the past discloses that there

has been no real correspondence between the incidence of death and the difficulties of proof.

Material the subject of judicial notice shows that in North Carolina for every one person tried for his life because of Rape, many, many are relieved of that anguish. Rape is not a hard case to try in North Carolina: corroboration is not required, the case can be submitted to the jury on the testimony of the victim solely; a sense of chivalry makes the jury reluctant to brand any girl not a slut a willing participant, and the defense of consent is consequently quite often not available in this State. Obviously then, it is not par for the course for only one of every fifty-five to result in a capital trial. And the discretionary decisions bringing about such disparity are all made within the realm belonging to the prosecution.

Defendant believes that FURMAN V. GEORGIA did not intend to sanction the anomaly of forbidding overt discretion by the jury in the view of all, but permitting the covert variety by the District Attorney known to nobody except the defendant, the victim, and law enforcement officers.

Defendant does not contend that the consequences must be abolition of death sentences for rape. He contends that the consequence must be a suspension of such sentences until a procedure is adopted whereby, in open court, a decision can be made predicated upon problems of proof.

Mandatory supervision of all decisions not to seek the death penalty would not require extended hearing of evidence, nor uncritical acceptance of the District Attorney's doubts of conviction. In every capital case doubts of conviction are always predicated upon objective facts which can be established without taking long testimony. For example, in rape cases, aside from instances where the victim refuses to testify, or has made prior inconsistent statements, one or more of the following objective elements always exist in cases where a conviction is not obtained before the jury:

1. There was no outcry.

2. There was long delay in reporting.

3. Accusation was preceded by unwanted discovery by others of embarrasing sexual intercourse.

4. There was no injury to the genital area and no deadly weapon.

5. The victim and defendant had had prior social relationships.

6. There was an iron-clad alibi.

7. The victim had a history of promiscuous sexual intercourse.

(Question No. 10)

ASHTON V. KENTUCKY relieves the defendant of the burden of showing racial, religious, or class discrimination and places the burden of showing its absence on the Legislature.

The defendant has no specific case by case comparisons showing that persons in his class, indigents, have been discriminated against in Rape cases. He argues, supra, that public record statistics show that the choice between those to die and those to live is predicated upon matters of one kind or another which are not related to difficulties of proof -- that is, many persons are bound to have been favored upon criteria extraneous to the law and the evidence. He still contends that such a showing is sufficient under FURMAN V. GEORGIA.

He here contends that if the Constitution nevertheless requires that there be an actual determination of discrimination based on color, class, religion, etc. then ASHTON V. KENTUCKY, 384 US 195, requires that the burden fall on the Legislature. Neither the defendant, the Supreme Court of North Carolina, nor this Court, is in a position to make such an investigation. But the Legislature is. FURMAN V. GEORGIA, in conjunction with ASHTON V. KENTUCKY, 384 US 195, requires every legislature to review its practices and inform the public whether the practices are now such as to validate death sentences. If that is

not done, by re-enactment of death statutes, or otherwise, the death sentence must be suspended in every state in default.

(Question No. 11)

A verdict by a jury ignorant that death was its necessary consequence violates the Due Process Clause of the 14th Amendment and the jury trial provision of the Sixth Amendment.

Although jurors have a healthy scepticism concerning statements by lawyers, the constant reference to death penalty during voir dire, the unobjected to pleas by defense counsel for the life of his client, made it highly likely that the jury below knew that death was possible. But they did not know that death was mandatory. They were just as much interested in whether the Judge could grant clemency as in whether they could. And since it was inconceivable to them that the fact would be concealed if death were mandatory, the instruction of the Court that the matter was a concern of his, not theirs, informed them that a guilty verdict would not hang a death on their conscience; that the proximate cause of any death would be the trial Court.

It was impossible for a juror not to know that death was the necessary result of his verdict at common law. A capital trial was more than a case in court; it was a public ceremony -- a pageant, as it were -- with death as the central theme. During arraignment the prisoner was solemnly advised to invoke the Deity to preside over his jury; to ask that he be tried by his God and his Country. And every juror was made to undergo a "purification" ceremony of his own. Seated alone on a dais he was cynosure of all eyes while being probed by counsel; and in the event he tended to forget that he would be killing a living spirit he was required to undergo an eyeball to eyeball confrontation with the prisoner, to look the prisoner squarely in the eye and carry the

indelible image thenceforth with him into the box. Much was lost when North Carolina abandoned the practice and began selecting capital case juries in the same way as trespass cases.

This ceremony, like all ceremonies, was designed to fill a human need; to assure the public that the government was also in awe of the great mystery of life, and well knew that a death trial should be a thing apart from other criminal cases. In all ages the philosophy that voluntarily taking life under any circumstances is an assault against the meaning of existence and forbidden by God has been widespread. And no less today. To trick a juror into a sin felt by him to be mortal was unthinkable.

With more than due respect for the Supreme Court of North Carolina, counsel feels that the Court's objective is a will-of-the-wisp. Obviously, absent action by this Court, or the Legislature, it will soon again become a matter of public knowledge in North Carolina that death is mandatory; and any scheme to hide it from the jury will eventually be a futile one. Further, the interim result will be that convictions will depend in part upon how knowledgeable the jurors are about the law. In fact, in STATE V. BRITT (May 1974) the Supreme Court of North Carolina held that if it appears the jury is uncertain concerning the effect of their verdict they should be instructed. (BRITT is the subject of a separate Motion in this cause in this Court). Thus, in North Carolina a verdict by an ignorant jury can stand, but a verdict by an uncertain jury cannot. Surely, the Due Process Clause does not permit the State to impose death sentences by lottery.

How easy it is now to kill in North Carolina. The trial judge's conscience is clear because the law gives him no alternative, and the same is true of the executioner. The jury has no qualms because they are not permitted to know what is at stake except in cases where their ignorance "shows". (See Question No. 12) The Appellate Courts of North Carolina

need no consolation because death is made mandatory, not by them, but by the Supreme Court of the United States. (See Question No. 7).

(Question No. 12)

FURMAN V. GEORGIA does not forbid the jury being told that death is a necessary consequence of their verdict.

The Attorney General laid it squarely on the line. He told the Supreme Court of North Carolina that if the jury were permitted to know the consequences of their verdict, the possible resultant exercise of jury discretion would cause the law to revert to pre-WADDELL (meaning pre-FURMAN) days, (State Brief p. 33). Since the Attorney General is charged with protecting the integrity of North Carolina's laws from federal attack, he was telling the Court that to inform the jury of the consequences might result in conviction statistics of an unpleasant pattern, and that the death penalty in North Carolina might thereby again run the risk of federal abolition.

The Supreme Court of North Carolina adopted his remedy. But the opinion in the instant case did not make clear whether they adopted his rationale; whether they acted under the compulsion of their view of FURMAN V. GEORGIA, or whether the decision was one of State law solely.

However, in STATE V. BRITT (May 1974) the North Carolina made it clear that the remedy flowed from FURMAN compulsion:

> "It is apparent that the decision of the United States Supreme Court in Furman v. Georgia, 408 US 238, 33 Led 2d 346, 92 S. Ct. 2726, and our interpretations of the effects of the Furman decision as related to punishment in capital cases have created some uncertainty among lawyers, the judiciary, and the general public, the source of the triers of fact in most litigation." (STATE V. BRITT, slip opinion, p. 11)

BRITT attempted to reconcile what was felt to be conflicting requirements of the U. S. Supreme Court. First, a requirement of FURMAN forbidding the court to commit or permit any act which facilitates jury discretion which serves to save life. Second, the requirement of WITHERSPOON that counsel has a right to probe the jury concerning religious scruples.

Because of the past history of jury clemency in North Carolina, the action of the trial jury in the BRITT case made it manifest to the Supreme Court of North Carolina that a refusal of the trial Court to discuss the question of clemency could very well leave the impression that it was available -- it being unthinkable that the Court would not say so if death were mandatory. However, feeling constrained by FURMAN the Supreme Court of North Carolina refused to either require or permit the trial judge to talk about the consequences of a guilty verdict unless the jury of its volition demonstrated uncertainty.

The Supreme Court of North Carolina laid down the following rules in BRITT:

1. Counsel for both sides can probe for religious scruples of jurymen.

2. Counsel for defendant can tell the jury that death is mandatory. (This would not be State action), and might dispel uncertainty.

3. Except as provided below, the Court cannot tell the jury that death is mandatory for this would be State action.

4. However, if the jury of its own volition makes it apparent that they are uncertain as to the law then it is the duty of the Court to tell them that death is mandatory. This violation of FURMAN is proper because it is a necessity thrust upon the Court, and is not of the Court's own seeking.

Obviously, unless FURMAN forbids, the above state of affairs should be quickly ended and the Court permitted to tell the jury the truth. And if FURMAN does not forbid, a statement to that effect from this Court would save no little amount of future litigation and could reduce the largest death row in the country to normal size.

(Question No. 13)

Disparate treatment of alibi defendants concerning corpus delicti violates the Due Process and Equal Protection of the Laws Provisions of U. S. Constitution.

Defendant contended below that the testimony of the witness that she submitted to the defendant unqualified by any statement that she did so from fear of great bodily harm, made it a jury question as to whether or not defendant was guilty of a lesser offense. Further, defendant contended that testimony of witness that she locked all the doors coupled with her testimony she noticed no signs of force having been applied to the doors or locks, and coupled with absence of evidence from the police that such force had been applied, made it a jury question as to whether or not one or more doors had been left open and whether or not the burglary was less than capital.

The Supreme Court of North Carolina disposed of both contentions with the following language:

> "Here, all the evidence shows a completed act of intercourse. Defendant's defense was alibi. There was no evidence to support either of the lesser included offenses." (p. 25) (italics added)

> "Defendant, without assignment of error, argues in his Brief that the lesser included offenses of burglary should have been submitted to the jury. This argument must fall by virtue of the same authorities and reasoning upon which we overruled Assignments of Error 32 and 33." (p. 25)

> "The record reveals no testimony which indicates any door of the mobile home was open at the time the defendant entered the trailer. Rather, the uncontradicted evidence is that all three doors were locked prior to defendant's entry." (p. 24)

Since the Supreme Court had held in STATE V. MADDEN, 192 SE 859 that testimony of locked doors coupled with testimony of no force having been applied to the doors required dismissal of the prosecution and acquittal of prisoner, and since the only real difference between MADDEN and this case is that in MADDEN there was no claim of alibi, it would seem clear that the basis for the decision below is the alibi claim of Henderson:

> "If, as the State contends, the defendant made his entry through the back door, just how he did so without damaging the woodwork, breaking or springing the lock, or disturbing the key, which was on the inside of the lock is shrouded in mystery and a subject merely of conjecture." (STATE V. MADDEN, 192 SE 859)

Nor is this something new. There is an established line of cases in North Carolina which predicate refusal to permit defendant to attack deficiencies in proof of corpus delicti on the ground that defendant relies on alibi:

STATE V. JOHNSON, 154 SE2d 402
STATE V. SMITH, 160 SE2d 577
STATE V. LENTZ, 153 SE2d 864
STATE V. HOBBS, 32 SE2d 431
STATE V. MELTON, 189 SE2d 757

and in his Brief (p. 56) defendant sought to get around these cases by claiming the rule was not one of law even though the trial bench and bar regarded it as such. This contention was rejected and the Court in the opinion emphasised that "Defendant's defense was alibi."

Every crime is divided into two parts: (1) the crime itself (corpus delicti) and (2) the perpetrator of the crime. And from time immemorial all defenses are set up within that framework: showing (1) that no crime occurred, and showing (2) that the defendant was not the criminal if there were a crime.

Denying a defendant who relies on alibi theright to attack the deficiencies of proof of corpus delicti, and binding him by all testimony tending to show a crime while denying him the benefit of all testimony tending to show there was no crime, obviously puts alibi defendants in a different category from other defendants.

The justification seems to be that if he is found guilty his alibi testimony is false, he is therefore either a perjurer or suborner of perjury, and consequently forfeits the right to litigate matters which occurred at a place and time from which he claims to have been absent.

This justification has two flaws: (1) the jury could well be mistaken, and (2) punishment for perjury should be handled separately.

And it is especially onerous in rape cases. Every derelict knows that if he is charged with rape by a female of a social status greatly higher than his,

unless he can show regular prior social contact, to claim consent is to confess guilt. Unless the female be known to be such, a jury is reluctant to brand her a slut. Consequently, there is a great temptation on the part of "poor white trash" and blacks to insist to their lawyer that they were not present, that the police have the "wrong man".

(Question No. 14)

Failure to have made, and introduced in evidence, laboratory tests of blood and hair deprived Defendant of a fair trial within meaning of Due Process Clause of Fourteenth Amendment.

The prosecution had samples of blood either of the victim or of the attacker. They had access to defendant's blood. Laboratory comparison of the blood on the sheets with that of victim and defendant would have shown whether or not the blood on the sheets came from victim or defendant. If this blood came from neither, the defendant would have been innocent beyond cavil. The prospect of so showing lay solely in the power of the prosecution; not in the power of the defendant.

The prosecution removed two hairs from defendant's body and claimed their length and color showed they came from the victim. Microscopic comparison would have established this point beyond attack; and if in favor of the defendant would have made improper and irrelevant the argument that the hairs found on defendant belonged to the victim.

The Supreme Court of North Carolina held that failure to obtain such laboratory evidence was not within the purview of BRADY V. MARYLAND, 373 US 83 because (1) the State did not suppress evidence, it merely neglected to obtain evidence, (2) because the defendant neither at or prior to trial objected to such failure, and (3) the constitutional question is beyond

judicial review because there is no way of knowing what the tests would have revealed and no way that defendant can show he was prejudiced.

The gravamen of BRADY V. MARYLAND is lack of fair trial, and its thrust is not limited to suppressing evidence as distinguished from failing to obtain. Suppression, of course, shows bad faith. But bad faith is not required. Suppression also shows knowledge of a possible benefit to the defendant on part of the State; and that showing is required. However, such knowledge can be indicated in other ways. You don't need formal evidence to prove that contemporary science can differentiate between samples of hair and samples of blood; and you don't need legal authority to establish that the best interests of justice are not served by leaving matters in the realm of conjecture which can be made definite and certain in a simple manner.

Failure of defendant to object at the trial is not a waiver. The evidence was admissible at common law, and a feckless objection before the jury would have been prejudicial -- tantamount to a confession of identity between the samples. Motion to Suppress would not have been prejudicial but it would have been feckless. The complaint is not to introduction of incompetent evidence; the complaint is to failure to introduce complementary evidence.

Failure of defendant to move before trial for an Order of Court requiring such laboratory tests is not a waiver because defendant was without counsel at the time the hairs were found. Also, there is no clear statutory authority for such a motion, and no provision for paying the costs thereof. (See GS 7A-454).

Respectfully submitted,

W. R. Dalton, Jr.
Dalton & Long
604 N. C. National Bank Building
Burlington, N. C. 27215
Phone 919-228-7881

[redacted]

STATE of North Carolina

v.

Allen James HENDERSON.

No. 8.

Supreme Court of North Carolina.

March 13, 1974.

Defendant was convicted in the Superior Court, Alamance County, John Webb, Special Judge, of first-degree burglary [illegible]. The Supreme Court, Branch, J., held that in-court identification testimony by prosecuting witness following [illegible] identification procedure, and that imposition of death penalty did not constitute cruel and unusual punishment.

[illegible]

Justice [illegible] and Sharp, JJ., dissented in part and filed opinion.

1. Constitutional Law ⇐=268(8)

Counsel can thus explore unconstitutionally obtained is excluded from both [illegible] process is not a rule of evidence, but a matter of constitutional law.

2. Constitutional Law ⇐=268(10)

Test under due process clause as to pretrial identification procedures is whether or the totality of the circumstances reveal pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. U.S.C.A.Const. Amend. 14.

3. Criminal Law ⇐=339, 641.2

Generally, an accused has a constitutional right to presence of counsel at an in-custody identification proceeding, and when counsel is not present, and where there is no voluntary waiver of counsel by accused, testimony of witnesses that they identified the accused at such confrontation must be excluded.

4. Criminal Law ⇐=339

In-court identification of accused by witness who took part in an illegal pretrial confrontation must be excluded unless it is first determined by trial judge on voir dire that the in-court identification is of independent origin and thus is not tainted by the illegal pretrial identification procedure.

5. Constitutional Law ⇐=268.1(7)

Criminal Law ⇐=641.2

A person's Sixth and Fourteenth Amendment right to counsel at pretrial identification procedures attaches only at or after the time that adversary judicial proceedings have been initiated against him. U.S.C.A.Const. Amends. 6, 14.

6. Criminal Law ⇐=641.3

Proceedings against defendant did not reach the critical stage which required presence of counsel for defendant where it was reasonable to infer that warrant was served on defendant after confrontation at sheriff's department and that, at the time of the confrontation, proceedings against defendant were investigatory rather than accusatory.

7. Constitutional Law ⇐=268(3)

The practice of showing suspects singly to persons for purposes of identification has been widely condemned, but whether such confrontation violates due process depends on the totality of the surrounding circumstances. U.S.C.A.Const. Amend. 14.

8. Criminal Law ⇐=339

Primary illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined on voir dire that the in-court identification is of independent origin.

9. Criminal Law ⇐=339

Factors to be considered in evaluating the likelihood of mistaken identification

ed at such confrontation must be

al Law ⊂=339

court identification of accused by who took part in an illegal pre- frontation must be excluded unless t determined by trial judge on voir t the in-court identification is of dent origin and thus is not tainted illegal pretrial identification proce-

al Law ⊂=339

Factors to be considered in evaluating likelihood of mistaken identification include the opportunity of the witness to view criminal at time of crime, degree of attention of the witness, accuracy of prior description of criminal by the witness, level of certainty demonstrated by witness at the confrontation, and length of time between the crime and the confrontation.

10. Criminal Law ⊂=339

Under the totality of the circumstances in prosecution for burglary and rape, in-court identification by victim of defendant was not tainted by pretrial confrontation which was allegedly illegal because it involved a single exhibition of defendant who was in custody under circumstances which could have easily permitted the formation of a lineup. U.S.C.A.Const. Amends. 6, 14.

11. Criminal Law ⊂=339(5)

While terms such as "I think," "my impression is" or "I believe" connote an indistinctiveness of perception or memory in a witness, they are not objectionable although they carry little weight.

12. Criminal Law ⊂=566

Identity is provable by circumstantial evidence in a criminal prosecution, even when there is a direct identification by a witness.

13. Criminal Law ⊂=1169.9

Admission of testimony of prosecutrix, in prosecution for rape and burglary, who stated that defendant asked her if she knew a family and that "I think the name was Wood", was not a prejudicial expression of opinion where defendant, on cross-examination, testified that he worked for a man named Woods.

14. Burglary ⊂=16

A "breaking" is an essential element of the offense of first-degree burglary. G.S. § 14-51.

15. Burglary ⊂=9(1)

There is a sufficient "breaking" to sustain a charge of first degree burglary when a person unlocks a door with a key, or opens a closed but not fastened window. G.S. § 14-51.

See publication Words and Phrases for other judicial constructions and definitions.

16. Burglary ⊂=9(1)

In order to show a breaking, in prosecution for burglary, it is not required that the State offer evidence of damage to a door or window. G.S. § 14-51.

17. Burglary ⊂=41(6)

Ample evidence existed, in prosecution for burglary and rape, from which jury could infer that there was a "breaking" within meaning of that term as used in reference to first-degree burglary, where, inter alia, prosecuting witness unequivocally testified that "before I laid down across the bed, I locked my doors." G.S. § 14-51.

18. Rape ⊂=1

"Rape" is carnal knowledge of a female by force and against her will.

See publication Words and Phrases for other judicial constructions and definitions.

19. Rape ⊂=6

The force necessary to constitute rape need not be actual physical force; fear, fright or coercion may take the place of the physical force.

20. Rape ⊂=11

Although consent is a perfect defense to a charge of rape, there is no legal consent when it is induced by violence or threat of violence.

21. Rape ⊂=57(1, 3)

Ample evidence existed in relation to both physical force and overpowering coercion and fear as to require jury in rape prosecution to determine whether or not defendant obtained carnal knowledge of prosecutrix forcibly and against her will.

22. Burglary ⊂⇒9

Entry of a dwelling or sleeping apartment is an essential element of the crime of burglary. G.S. § 14-51.

23. Criminal Law ⊂⇒822(1)

Trial judge's charge must be construed contextually as a whole, and when, so construed, it presents the law of the case in such manner as to leave no reasonable cause to believe that jury was misled or misinformed, an exception thereto will not be sustained.

24. Burglary ⊂⇒6(3)

Instruction of trial judge, in prosecution for burglary and rape, in which judge stated, inter alia, that State had to prove that the building was entered by the defendant "• • • coming into the mobile home and reaching into the bedroom would be an entering," was not sufficient to confuse the jurors or mislead them into believing that State did not need to prove the element of "breaking" in relation to burglary charge, where immediately after such statement the trial judge recited five additional elements of the crime that the State had to prove, in each of which trial judge specifically mentioned both the elements of breaking and entering. G.S. § 14-51.

25. Criminal Law ⊂⇒822(3)

Contextual reading of charge, in prosecution for burglary and rape, did not disclose that admittedly erroneous statements of trial judge, to effect that defendant's alibi was in the form of his own testimony, unduly highlighted the fact that only defendant's testimony supported the defense of alibi, or require a finding that trial judge thereby erroneously expressed an opinion concerning strength of defendant's defense.

26. Criminal Law ⊂⇒719

In criminal cases the general rule is that trial judge has the sole responsibility to render judgments upon jury verdicts within the limits prescribed by statute, and that the sole responsibility of the jury is to the determine the guilt or innocence of accused without being hindered by the quantum of punishment possible, probable or certain upon conviction.

27. Criminal Law ⊂⇒796

Trial judge properly refused, in prosecution for burglary and rape, to instruct jury as to the punishment which would result from conviction.

28. Criminal Law ⊂⇒1155(1)

Failure of officers to pursue particular investigative procedures relating to microscopic comparison of blood hair found on clothing of defendant, charged with burglary and rape, or to make laboratory comparison of defendant's blood and blood found on bed clothing belonging to prosecutrix, was not prejudicial error where there was strong evidence identifying defendant as the person who committed the crimes, and where record did not disclose that defense counsel sought to have such tests performed, that he requested the State to conduct such tests or that he sought to suppress evidence of the hair or the blood stains at trial.

29. Criminal Law ⊂⇒814(5)

Failure to instruct jury, in prosecution for rape and burglary, that if door were open the slightest degree the entering through such door would not be a "breaking", was not error where record revealed no testimony which indicated that any door of mobile home of victim was open at time defendant entered, but where, rather, the uncontroverted evidence was that all three doors were locked prior to defendant's entry. G.S. §§ 1-180, 14-51.

30. Burglary ⊂⇒6(3)

Criminal Law ⊂⇒1172.1(3)

Language of charge, in prosecution for burglary and rape, stating that a breaking "• • • simply means the opening or removal of anything blocking entrance, so

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Trial judge properly refused, in prosecution for burglary and rape, to instruct as to the punishment which would re-

riminal Law ⇐1172(3)

Failure of officers to observe particular legative procedures relating to questioning of defendant, charged with burglary and rape, or to make laboratory comparison of defendant's blood and blood on bed clothing belonging to prosecutrix, was not prejudicial error where there was strong evidence identifying defendant as the person who committed the crimes, and where record did not disclose defense counsel sought to have such performed, had he requested the State collect such tests, or that he sought to introduce evidence of the lack or the blood at trial.

riminal Law ⇐1169(1)

Failure to instruct jury, in prosecution for rape and burglary, that if defendant opened the shielded screen the entering might exist would not in a "breaking" was not error where record revealed testimony which indicated that any door which [illegible] was open at time defendant entered, but where, rather, the prosecuted evidence was that all three were locked prior to defendant's entry. G.S. §§ 1-180, 14-51.

urglary ⇐45(3)

riminal Law ⇐1172.1(3)

Language of charge, in prosecution for ary and rape, stating that a breaking * * * simply means the opening or val of anything blocking entrance, so the pushing open of a door that is latched would be a breaking.", would not be approved by Supreme Court, but reversal was not required where it did not appear that the jury was misled by such language. G.S. § 14-51.

31. Criminal Law ⇐795(1)

Necessity for instructing jury as to an included crime of lesser degree than the one charged arises only when there is evidence tending to support the included crime of lesser degree.

13. Rape ⇐59(9)

There was no evidence in rape prosecution to support either the lesser included offenses of assault with intent to commit rape or assault on a female where all evidence showed a completed act of intercourse, and where defendant's defense was alibi.

33. Rape ⇐55(18)

Charge on attempt to commit rape, as it related to charge of first-degree burglary, was adequate since, inter alia, record evidence showed that the intent was in fact, executed in connection with a brutal assault.

34. Criminal Law ⇐814(20)

Refusal to give instruction, in prosecution for burglary and rape, that if defendant entered the bedroom of prosecutrix without intent to use force, but only formed the intent to accomplish his purpose by force after she screamed, jury could return a verdict of guilty of the lesser included offense of nonburglarious breaking and entering, was proper where there was no evidence to support the instruction and where if such instruction, which was not requested by defendant's counsel, had been given it would have run counter to the sole defense of alibi.

35. Rape ⇐59(17)

Instruction on charge of rape, which advised the jury, inter alia, that it would be their duty to return a verdict of guilty if they found from the evidence beyond a reasonable doubt that defendant, by use of force or threat of force, had sexual intercourse with prosecutrix without her consent and against her will, sufficiently described the required degree of resistance.

36. Criminal Law ⇐841

Generally, objections to charge relating to the stating of the contentions of parties, or to misapprehending the evidence, must be called to court's attention in time to afford opportunity for correction, but such rule does not apply where contentions were given by the judge which were based on unintroduced evidence, which erroneously recited defendant's testimony, or which misstated the burden of proof to defendant's prejudice.

37. Criminal Law ⇐1172.1(2)

Failure of trial judge, in prosecution for rape and burglary, to include in his charge certain evidence which defense counsel elicited on cross-examination, did not require reversal where, inter alia, question of whether victim recognized color of her assailant's shirt, noticed the damage to her locks, or made an inconsistent statement concerning being knocked off the bed by her assailant, did not appear to be of crucial importance to defendant's defense, and where contextual reading of entire charge failed to show that the charge was weighted in favor of the State or that omission of the matters complained of amounted to an expression of opinion of trial judge in violation of statute. G.S. § 1-180.

38. Constitutional Law ⇐270

Criminal Law ⇐1213

Death sentence imposed upon defendant, who was convicted of burglary and rape, did not constitute cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. U.S.C.A.Const. Amends. 8, 14.

Prior to his trial, defendant was represented by Mr. Wiley P. Wooten, who was appointed by the court on 20 June 1973. Thereafter defendant employed Mr. Fred Darlington, III, of the Alamance County Bar to represent him on these charges, and by Order dated 9 August 1973 Mr. Wooten was relieved of further responsibilities as court-appointed counsel. Prior to his discharge, Mr. Wooten had obtained an Order committing defendant to Cherry Hospital for sixty days for observation and determination of his competency to stand trial upon the pending charges. The Court was furnished with the appropriate certificate and disclosure statement signed by Dr. Eugene V. Maynard, of the Cherry Hospital Staff, which stated that examination, observation and testing performed at Cherry Hospital revealed no evidence of insanity or any comparable mental disorder which might interfere with defendant's competency to stand trial upon the charges of first degree burglary and rape.

Upon his arraignment defendant entered a plea of not guilty to both charges.

The State's evidence, in substance, discloses the following:

Judith Ann Strader testified that she was employed as a teacher by the Burlington City School system. On the night of 18 June 1973, she returned to her mobile home in Terrywood Mobile Home Park at about 9:30 p. m. after attending a ceramics class in Burlington. She lived in a 65 foot mobile home which contained two bedrooms, a living room, dining room and kitchen. The master bedroom is at one end of the mobile home and the kitchen is at the other end. The living room is located between the kitchen and master bedroom and the front door of the mobile home enters into the living room. There is a back door to the kitchen and a back door entering the hall next to the bathroom serving the master bedroom. After visiting a neighbor, she locked the doors of the mobile home, undressed and put on a robe. She lay down on her bed in the master bedroom between 10:30 and 10:45 p. m. and dropped off to sleep. She had planned to get up and straighten the kitchen and had therefore left the lights on in the living room. There were three Duke Power night lights located near her trailer. One light was near the front of the mobile home, one was near the rear of the trailer and one light was across the street so that it shone almost directly into her bedroom window. The moon was about half full on this night. She was awakened by the barking of her Pekinese dog, and when she sat up in the bed, she saw a man standing in the doorway of her bedroom.

At this point the Solicitor asked if the first she saw on that night was in the courtroom. Defendant's counsel objected and asked to be heard. After a voir dire hearing, the trial judge overruled defendant's objection and motion to suppress. (We will hereafter more fully discuss the voir dire hearing and the resulting ruling by the trial judge.)

The jury returned to the courtroom and Judith Ann Strader identified defendant as her assailant. She further testified:

"When I was aroused by my dog, I saw the man standing in the doorway of my bedroom and I raised up on my arms and looked and first I felt shocked and then he lunged at me. I was struggling to get away, and I screamed two or three times. I am not sure, and I screamed and when I did he hit me with his fist in my face and bruised my upper face and forehead, my eyes, the side of my face and my lip and I kept struggling the best that I knew how to get away and at this time he started choking me. He didn't say anything at all at that time. He choked me almost to the point I felt all the air and everything going out of my body, and he pushed me up in the bed and at this time he did rape me, keeping one hand at my neck part of the time and my body was pinned down. My body was pinned down. The defendant's private parts entered my private

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parts. I didn't give consent for him to have intercourse with me. I didn't give the defendant or any other person consent or permission to come into my mobile home that night. . . . ."

Miss Strader further stated that defendant remained in her trailer for nearly an hour, and upon the pretext of quieting her barking dog she managed to escape and flee to a nearby trailer occupied by Mr. and Mrs. Don Hall. The Hails summoned law

[illegible] and [illegible] the police arrived. [illegible] then she was carried to the hospital.

Mrs. Elizabeth Hall testified that in the early morning hours of 19 June 1973, Judith Strader came to her mobile home in a hysterical condition. Miss Strader told her that there was a man in her trailer and that he had raped her. Mrs. Hall said that at that time she looked out the window and saw a large colored male leaving the victim's trailer with a dent to the side and back window. The automobile was being operated in a manner [illegible] Mrs. Hall testified that there was a knot and a bruise over Judith Strader's right eye, a bruise on her left eye, red marks on her throat and that her lip was swollen.

Mr. James Little of the Alamance County Sheriff's Department testified that in response to a call he went to Judith Ann Strader's mobile home. He said the person there was Mr. Don Hall. He noted the bedroom "torn up", the bedspread on the floor and blood on the sheets and pillow case. He talked to Miss Strader at about 1:30 a. m. on 19 June 1973. The statement made to him by Miss Strader was admitted into evidence under a proper limiting instruction.

Mr. James Andrews of the Alamance County Sheriff's Department testified that as a result of a call, he stopped defendant at about 1:30 a. m. on 19 June 1973 on Highway 49 near Haw River. Defendant was operating a 1964 light colored Chevelle with a damaged back fender. At his request, defendant accompanied him to the Alamance County Sheriff's Department where Officer Talbert advised defendant of his Constitutional rights.

Mr. Kenneth Talbert of the Alamance County Sheriff's Department stated that he talked with defendant during the early morning hours of 19 June 1973. After advising defendant of his rights he began to question him, but defendant said that he did not wish to answer any questions until he had contacted an attorney. However [illegible] agreed to the removal of his clothing, and Mr. Talbert found two head hairs about 12 to 18 inches in length on defendant's clothes.

The State rested and defendant's motions as of nonsuit as to both charges were denied.

Defendant, testifying in his own behalf, stated that he lived with his wife and two children in a mobile home in Terrywood Park. His daughter had sandy blond hair. He had seen Judith Strader, who was acquainted with his wife, around the trailer park. On 18 June 1973 he worked until about 4:30 p. m. for Alcar Tree Company. On that day he wore a hooded work shirt, trousers and lace-up boots. Upon leaving work, he went to his mother's home in Graham for a short visit, then to the ABC store in Graham where he purchased a pint of vodka. He then went to Dean Bonding Company where he had a drink, then to Mebane where he drank two beers, then into Caswell County where he took another drink of vodka then returned to Mebane where he drank three beers, then to Hillsborough where he had two beers. He started to Burlington on Highway I-85, and he was stopped at about 8:30 p. m. and cited for speeding 80 mph in a 65 mph zone. From there he proceeded to Gus' Drive In on Highway 54 between Burlington and Graham where he drank more beer. He then went to a cafe for more beer. He left the cafe at about 11:00 p. m. and returned to Gus' Drive In where he remained until about midnight. He returned to Highway I-85 and left that highway at

the Haw River Exit where he stopped and called his wife from a telephone booth. After talking to her for 15 to 25 minutes, he proceeded through and beyond Haw River, North Carolina, on Highway 49 where he was stopped by a police officer. He did not go back to Terrywood Mobile Home Park after he left there at about 6:00 a. m. on the morning of the 18th. The scratches on his arms were caused by his tree cutting work. He had been convicted of assault with attempt to commit rape in 1969. He could not remember the number of assault charges for which he had been convicted.

Upon completion of defendant's testimony, both the state and defendant rested.

The jury returned verdicts of guilty of first degree burglary and rape.

The trial judge pronounced judgment sentencing [illegible] Henderson to death by asphyxiation.

Atty. Gen. Robert Morgan and Associate Attorney Richard L. Griffin, Raleigh, for the State.

W. R. Dalton, Jr. and Fred Darlington, III, Burlington, for defendant-appellant.

David E. Kendall, New York City, for the NAACP Legal Defense Fund.

BRANCH, Justice.

Defendant assigns as error the admission, over his objection, of the in-court identification testimony by the prosecuting witness, Judith Strader. He argues that this testimony was tainted by an out-of-court identification procedure which violated Constitutional rights guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution in that the identification procedure was conducted in the absence of counsel and was impermissibly suggestive and conducive to mistaken identification.

Since the State did not offer evidence in presence of the jury concerning identification of the accused at a lineup or a show up, we are only concerned with the admissibility of the in-court identification testimony.

[1, 2] Since Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, the general rule has been that evidence unconstitutionally obtained is excluded in both State and Federal Courts as essential to due process—not as a rule of evidence but as a matter of Constitutional law. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345; State v. Colson, 274 N.C. 295, 163 S.E.2d 376. The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances render pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402; Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199; Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183; State v. Hoskins, 277 N.C. 52, 176 S.E.2d 600; State v. Austin, 276 N.C. 291, 172 S.E.2d 507; State v. Rogers, *supra*.

These due process requirements have been enlarged by case holdings requiring presence of counsel at lineups or showups. United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149; Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178; Stovall v. Denno, *supra*. The broad principles set forth in *Wade*, *Gilbert* and *Stovall* resulted in many diverse interpretations by other appellate courts. One of the questions causing conflict in the appellate courts was at what stage of the proceedings the rule requiring presence of counsel became operative.

[3, 4] Our Court has generally held that an accused has a Constitutional right to presence of counsel at an in-custody identification proceeding, and when counsel is not present and there is no voluntary waiver of counsel by the accused, testimony of witnesses that they identified the accused

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N.C. 201, 162 S.E.2d 218 [illegible]

such confrontation must be excluded. Furthermore, an in-court identification of the accused by a witness who took part in such pretrial confrontation must be excluded unless it is first determined by the trial judge on voir dire that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. *United States v. Wade*, *supra*; *Gilbert v. California*, *supra*; *State v. Bass*, 281 N.C. 435, 189 S.E.2d 384; *State v. Smith*, 278 N.C. 476, 180 S.E.2d 7; *State v. Worthy*, *supra*; *Foley v. Rogers*, *supra*.

[3] The recent case of *Foley v. Rogers*, [illegible] 203 S.E.2d 49 (1973), which defendant cites and relies upon, considerably moves the stage at which the right to counsel attaches in pretrial identification procedures. In that case, the United States Supreme Court held that a person's Sixth and Fourteenth Amendment right to counsel in pretrial identification procedures attaches only "at or after the time that adversary judicial proceedings have been initiated against him." *See also State v. Morris*, 281 N.C. 698, 190 S.E.2d 164. Although our Court's rather broad [illegible] appear to be at odds with the holding in *Kirby*, Confrontation or the Court of Appeals of Kirby Court's interpretation of the right to counsel at pretrial confrontation procedures has often comported with the rationale of the holding in *Kirby*. [illegible] Where such confrontations for investigatory steps of proceedings were not in the critical stage, requiring presence of counsel. *State v. Mems*, *supra*; *State v. McNeil*, 277 N.C. 162, 176 S.E.2d 775. In *State v. Wright*, 274 N.C. 84, 161 S.E.2d 581 this Court held that defendant's right to counsel in a pretrial identification procedure was not violated until the proceeding [illegible] lost its character as a pretrial investigative procedure and became a "critical" stage [illegible] requiring the presence of counsel. Even so, the holding in *Kirby* considerably narrows our interpretation as to when the right to counsel attaches in pretrial identification proceedings.

It is not argued that defendant was an indigent and subject to the provisions of Article 36 of Chapter 7A of the General Statutes. However, we note that the General Assembly amended G.S. § 7A-451(b)(2), effective 10 April 1973, to require counsel for indigents at pretrial identification proceedings *only after formal charges have been preferred* and at which the presence of the indigent was required. This amendment apparently stems from the holding in *Kirby*.

[4] Here, the alleged rape occurred after midnight on 19 June 1973. Judith Strader reported at a nearby neighbor's home and police officers arrived. She was questioned by them, and thereafter she was taken to the hospital for examination and treatment. The record does not disclose at what time the return to the hospital. Defendant was taken to the sheriff's Department at about 2:30 a.m. on the morning of 19 June 1973. The confrontation between Judith Strader and defendant occurred at the Sheriff's Department at about 10:00 a.m. on the same day. The record does not indicate that any adversary judicial criminal proceedings had been initiated against defendant prior to the confrontation. The record does show that a warrant was served on defendant on the same day. There had been no previous identification of defendant. It is therefore reasonable to infer that the warrant was served after the confrontation at the Sheriff's Department and that at the time of the confrontation the proceeding was investigatory rather than accusatory. Thus the proceeding had not reached the critical stage which required the presence of counsel for defendant.

Defendant further contends that the confrontation offended fundamental standards of decency, fairness and justice so as to deny him his Constitutional right of due process.

[7] The practice of showing suspects singly to persons for purposes of identification has been widely condemned. Stovall

v. Denno, *supra*; State v. Wright, *supra*. However, whether such a confrontation violates due process depends on the totality of the surrounding circumstances. Stovall v. Denno, *supra*.

We recognize that there are circumstances under which the single exhibition of a suspect may be proper. The landmark case of Stovall v. Denno, *supra*, held that the showing of a single suspect in a hospital room while he was handcuffed to police officers did not violate due process because the [illegible] of the witness required an immediate confrontation. Our courts have held that there was no violation of due process when there were "unusual" courtroom and station house confrontations which amounted to single exhibitions of the accused. State v. Tuggle, 284 N.C. 518, 201 S.E.2d 844; State v. Rose, *supra*; State v. Hankins, *supra*; State v. Gaither, 278 N.C. 635, 180 S.E.2d 793. Similarly, we have recognized that a confrontation which takes place when a suspect is apprehended immediately after the commission of the crime may be proper. State v. McNeil, *supra*.

Whether an accused has been denied due process by a showup is a single inquiry and all of the accused requires an application of the recognized principles of law to the total circumstances. This often presents a difficult task.

Here, the fact that the single exhibition of defendant was held within a short time and as soon as feasible after the assault when the prosecuting witness had the opportunity to closely observe her assailant is counterbalanced by the fact that defendant was in custody under circumstances which would have easily permitted the formation of a lineup. However, the facts of this case do not require decision of this question. Even if we were to concede the confrontation to have been unconstitutionally suggestive and conducive to misidentification, and we do not, we are of the opinion that the in-court identification was properly admitted into evidence.

[8] It is well established that the primary illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined on voir dire that the in-court identification is of independent origin. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; State v. Bass, *supra*; State v. Austin, *supra*; State v. Rogers, *supra*; State v. Wright, *supra*.

The recent case of Neil v. Biggers, [illegible] U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 [illegible] to federal cases. In [illegible] the defendant was arrested of rape. [illegible] evidence against him included [illegible] the prosecutrix at a pretrial police show[illegible] which consisted of two detectives walking the defendant past her.

In that case, the Court noted:

". . . . The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial (sic) light in her home and under a full moon outside, and at least twice, once in the house and later in the woods, faced him directly and intimately. . . . Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, . . . was more than adequate and thorough. She had 'no doubt' that respondent was the person who raped her. . . . She testified . . . that there was something about his eyes 'I don't think I could ever forget.'"

[9] In holding that the evidence was properly admitted and that the identification was reliable even though the confrontation procedure was suggestive, the Court set out certain factors to be considered in evaluating the likelihood of misidentification, including: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the

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[illegible] record [illegible] of Neil v. Biggers, 409 [illegible] defendant was convicted of rape. The [illegible] victim's testimony by [illegible] h consisted of two identical walking [illegible] defendant just [illegible]

[illegible] that [illegible] Court noted:

"[illegible] had ample opportunity to observe her assailant, up to [illegible] lf an hour. She was with him under adequate conditions [illegible] [illegible] [illegible]

of defendant was not tainted by the out-of-court confrontation and the trial judge correctly overruled defendant's objection and motion to suppress.

Defendant's seventh assignment of error is as follows:

"7. That his Honor erred in permitting the witness to state: 'He asked me if I knew a family I didn't know. I think the name was Wood', as shown by EXCEPTION NO. 8 (R p 25)."

The Solicitor asked the witness Linda Strader to tell what defendant did after she first saw him in the trailer. After testifying to the actual rape act, without further questioning, told of conversations occurring after the assault. While relating the conversation she, in part, testified:

". . . And then I said, 'Who are you?' He said, 'If I told you, then you would know who I was,' and he asked me my name. He asked me where I was from and I told him, and he asked if I knew a family I didn't know. I think the name was Wood.

MR. HARLINGTON: OBJECTION.

THE COURT: OVERRULED.

DEFENDANT'S EXCEPTION NO. 8"

Defendant seems to contend that the use of the words "I think" was a prejudicial expression of opinion.

[11] When terms such as "I think", "my impression is" or "I believe" connote an indistinctiveness of perception or memory, they are not objectionable although they may carry little weight. 1 Stansbury's North Carolina Evidence, § 122 (Brandis Revision 1973); McCormick, on Evidence, § 10 (1954 Ed.); State v. Haney, 263 N.C. 816, 140 S.E.2d 514.

Obviously, Miss Strader's use of the words "I think" indicated an unsure memory as to the family name.

[12] Defendant, on cross-examination, testified that he worked for a man named Woods. We think at this point the evidence became relevant and competent on the question of identity since identity is provable by circumstantial evidence even when there is a direct identification by a witness. State v. Perry, 275 N.C. 565, 169 S.E.2d 839.

The ground upon which defendant asserts his objection was not indicated by the question. However, defendant's counsel should have moved to strike the portion of the answer which he considered objectionable. 1 Stansbury's North Carolina Evidence, § 27 (Brandis Revision 1973); State v. Little, 228 N.C. 484, 391 S.E.2d 1. Counsel did not move to strike the aforequoted testimony or the subsequent evidence that defendant had worked for a man named Woods.

[13] It should be clearly understood that this assignment of error would not be decided adversely to defendant in this capital case because of the absence of motion to strike. Nevertheless, we think that the failure of defendant's able and experienced counsel to move that the testimony be stricken highlights his own characterization of the evidence as originally admitted as being innocuous and our conclusion that no prejudicial error resulted because of its admission.

This assignment of error is overruled.

Defendant contends that the trial judge erred in denying his motion for judgment as of nonsuit as to the charge of first degree burglary because there was no evidence of a "breaking".

[14, 15] Burglary in the first degree is the breaking and entering during the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony therein. G.S. § 14-51; State v. Cox, 281 N.C. 131, 187 S.E.2d 785; State v. Allen, 279 N.C. 115, 181 S.E.2d 453. A "breaking" is an essential element of the offense of first degree burglary. State v. Knight,

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he ground upon which defendant as- objection was not believed by the

3] It should be clear that this assignment of error would not

361 N.C. 17, 134 S.E.2d 101; State v. McAfee, 247 N.C. 98, 100 S.E.2d 239; State v. Chambers, 218 N.C. 442, 11 S.E.2d 260. This Court has held that there is a sufficient "breaking" to sustain a charge of first degree burglary when a person unlocks a door with a key, State v. Knight, *supra*, or opens a closed, but not fastened window, State v. McAfee, *supra*.

Here defendant's counsel concedes that the opening of a closed door would be sufficient evidence of breaking. He argues,

the doors were closed.

the evidence must be considered in the light the benefit of every reasonable inference to be drawn therefrom, and nonsuit should direct, circumstantial or both, from which the jury could find that the offense charged has been committed and that defendant committed it. State v. Quick, 253 N.C. 369, 117 S.E.2d 1; State v. Vincent, 250 N.C. 43, 107 S.E.2d 516; State v. Nevin, 200 N.C. 129, 156 S.E. 134; 3 Strong's Index 3d, Criminal Law § 107.

In this case, the prosecuting witness unequivocally testified that when I had been across the bed, I noticed my shorts. There were three." And on cross-examination she testified "I knew my door were locked. As to my having a recollection of seeing each door, I have a photo[graph] those doors . . . . I can't tell if the locks has been tampered with."

[16] In order to show a breaking it is not required that the State offer evidence of damage to a door or window. State v. Tippett, 270 N.C. 568, 155 S.E.2d 269.

[17] Conceding that the State did not offer direct evidence that the locks on the doors had been tampered with or that force had been applied to the locks, we think that there was ample evidence from which the jury could reasonably infer that there was a "breaking" within the meaning of the term as used in reference to first degree burglary.

Defendant next contends that his motion for judgment as of nonsuit as to the charges of rape was erroneously denied because there was insufficient evidence to show that prosecuting witness continued to resist until the offense was consummated.

[18-20] Rape is the carnal knowledge of a female person by force and against her

S.E.2d 913; State v. Poore, 275 N.C. 141, 165 S.E.2d 225; State v. Crawford, 260 N.C. 133, 132 S.E.2d [illegible]. The force necessary to constitute rape need not be actual physical force. Fear, fright, or coercion may take the place of physical force. State v. Williams, 292 N.C. 77, 165 S.E.2d 353; State v. Primus, *supra*. Although consent is a perfect defense to a charge of rape, there is no legal consent when it is procured by violence or threat of violence. State v. Carter, 268 N.C. 626, 151 S.E.2d 876.

The prosecutrix witness testified:

"When I was aroused by my dog I saw the man standing in the doorway of my bedroom and I raised up on my arms and looked and then I felt [illegible] and then he lunged at me. I was struggling to get away, and I screamed two or three times, I am not sure, and I screamed and when I did he hit me with his fist in my face and bruised my upper neck and bruised my eyes, the side of my face and my lip and I kept struggling the best that I knew how to get away and at this time he started choking me. He didn't say anything at all at that time. He choked me almost to the point I felt all the air and everything going out of my body, and he pushed me up in the bed and at this time he did rape me, keeping one hand at my neck part of the time and my body was pinned down. My body was pinned down. The defendant's private parts entered my private parts. I didn't give consent for him to have intercourse with me. I

didn't give the defendant or any other person consent or permission to come into my mobile home that night. . . . I felt like if I did try to get away he was going to kill me."

Thereafter, the State, for the purpose of corroboration, offered into evidence a statement made by the prosecuting witness to Officer James Little. This statement reiterated the violent assault upon Miss Strader and concluded with these words:

". . . After I submitted he wasn't as rough. He must have been there at least thirty-five or forty minutes. He asked if he could come back again and I said not."

Defendant relies on the above-quoted statement to support this assignment of error.

The statement by the prosecuting witness that she "submitted" must be examined in light of all of the surrounding circumstances. Miss Strader was subjected to a violent beating. She was choked until she "felt all the air and everything going out of her body." She was then pushed onto the bed, pinned down and raped. She "was struggling to get away." Further, Miss Strader positively stated that she did not consent to have intercourse with defendant, and that even after the completion of the carnal act, she feared that he was going to kill her.

Certainly under these circumstances the prosecuting witness resisted to the extent of her abilities. We cannot imagine circumstances more conducive to such fear and coercion as would supplant physical force.

[21] There was ample evidence of both physical force and overpowering coercion and fear to require a jury determination as to whether defendant obtained carnal knowledge of Judith Strader "forcibly and against her will."

Defendant's Assignment of Error No. 20 is as follows:

"That his Honor erred in instructing the jury:

'the second thing the State must prove is that the building was entered by the defendant coming into the mobile home, and coming into the bedroom would be an entering.'"

Defendant apparently contends that the instruction complained of amounted to an expression of opinion by the trial judge that the State did not have to show that there was a "breaking".

[22] The entry of a dwelling or sleeping apartment is an essential element of the crime of burglary. State v. Cox, *supra*.

Immediately prior to the instruction complained of, the trial judge charged that the State *must* prove beyond a reasonable doubt seven things, the first being that:

". . . there was *a breaking* by the defendant. This simply means the opening or removal of anything blocking entrance, as the pushing open of a door that is latched would be a 'breaking.' If you are satisfied beyond a reasonable doubt that *there was a breaking* of Miss Strader's mobile home that night, the State would have satisfied you of the first thing *necessary* for you to convict the defendant on this charge." (Emphasis added)

Immediately after the instruction assigned as error, the trial judge recited two additional elements of the crime that the State must prove. In each of these charges the trial judge specifically mentioned both the elements of breaking and entering.

[23] It is a well-recognized rule of law that the trial judge's charge must be construed contextually as a whole, and when so construed, it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception thereto will not be sustained. 7 N.C.Index 2d, Trial § 33.

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In the recent case of State v. Noell, N.C., 202 N.E.2d 750, Justice Moore, speaking for the Court stated:

"Police officers are under no duty to take any particular course of action when investigating a crime. Of course, they cannot suppress evidence. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). They are not required, however, to follow all investigative leads and to secure every possible bit of evidence, and their failure to do so is not prejudicial error. In People v. Baber, 31 Mich.App. 108, 187 N.W.2d 268 (1971), the failure of the police to check fingerprints in the room, to test a gun found at the scene of the crime for fingerprints, to check a broken window and screen for fibers of clothing, or otherwise take fingerprints in the house was held not to give rise to a valid claim of a constitutional denial of due process."

Since this assignment of error is related to the identification of defendant as the assailant, it must be borne in mind that there was no issue about a witness identifying defendant as the person who committed the crimes. Further, the record does not disclose that counsel made a request that tests be performed, that he requested the State to conduct these tests, or that he moved to suppress evidence of the blood hair or the blood stains at trial. Neither is there any indication that the officers or the prosecutor sought to suppress evidence favorable to defendant. In any event, defendant has failed to show prejudice since we have no way of knowing what the tests might have disclosed.

We find no prejudicial error in the failure of the officers to pursue these particular investigative procedures.

Defendant contends that the trial judge erred by failing to instruct the jury that if a door to the mobile home was open in the slightest degree, entering the trailer through that door would not be a breaking.

The trial judge in a criminal action is required to declare and explain the law arising on the evidence given in the case, and it is error to instruct on law which does not arise on the evidence. G.S. § 1-180; Wh... v. Cothran, 260 N.C. 510, 133 S.E.2d 132.

[29] The record reveals no testimon... which indicates that any door of the mobil... home was open at the time defendant entered the trailer. Rather the uncontroverted evidence is that all three doors were locked prior to defendant's entry. Therefore, it was not error for the trial judge to fail to instruct the jury that if the door were open... [illegible] entering [illegible] door would not be a breaking.

As part of this assignment of error, defendant argues that the trial judge erred by charging that a breaking "... simply means the opening or removal of anything blocking entrance, so the pushing open of a door that is latched would be breaking."

The trial judge in other portions of the charge correctly instructed on the law of breaking as related to first degree burglary and the uncontroverted evidence shows that all the doors were locked.

[30] Although we do not approve of the language used by the trial judge in the portion of the charge, we do not believe that the jury was misled by this single statement.

This assignment of error is overruled.

By Assignments of Error Numbers 32 and 33, defendant objects to the court's failure to submit to the jury the lesser included offenses of rape—assault with intent to commit rape and assault on a female.

[31] The necessity for instructing the jury as to an included crime of lesser degree than the one charged arises only when there is evidence to support the included crime of lesser degree. State v. Watson, 283 N.C. 383, 196 S.E.2d 212; State v. Bryant, 280 N.C. 551, 187 S.E.2d 111; State v. Carnes, 279 N.C. 549, 184 S.E.2d

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This assignment of error is overruled.

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[32] Here, all the evidence shows a completed act of intercourse. Defendant's defense was alibi. There was no evidence to support either of the lesser included offenses.

The trial judge did not err by failing to instruct the jury on the charge of as... ...ult [illegible] to commit rape or upon the ... of assault upon a female.

... fendant, without assignment of error, ... argues in his brief that the court should ... ...ff ... of breaking should have been sub... ...mitted to the jury. This argument must fail by virtue of the same authorities and reasons upon which we overruled Assignments of Error 32 and 33.

By Assignments of Error 26 and 27, defendant contends that the trial judge failed to correctly charge on intent to commit rape as it related to the charge of first degree burglary.

... first argues that the trial judge did not instruct the jury that defendant must have had an intent to rape, his position notwithstanding any resistance on the part of the prosecuting witness.

In that connection the trial judge, in part, charged:

"The sixth thing that the State must prove and prove beyond a reasonable doubt before you can convict the defendant of first degree burglary is that at the time of the breaking and entering, the defendant intended to commit rape.

If you are satisfied from the evidence and beyond a reasonable doubt that at the time the defendant broke and entered this mobile home that he intended to rape Miss Strader then the State would have satisfied you of the sixth thing necessary for you to convict the defendant of first degree burglary.

"Now, I charge you as to the rape. Rape is the forcible sexual intercourse with a female person against her will.

I charge you for you to find the defendant guilty of rape, the State must prove three things beyond a reasonable doubt.

First, that the defendant had sexual intercourse with Miss Strader.

Second, that the defendant used or threatened to use force sufficient to overcome any resistance that she might make, and

Third, the State must prove and prove beyond a reasonable doubt that Miss Strader did not consent to the sexual intercourse and it was against her will.

[33] We think under the circumstances of this case, that the charge on the "intent to commit rape" was adequate. This is particularly so since the record evidence shows that the intent was, in fact, executed in connection with a brutal assault.

[34] Defendant further argues that the judge should have instructed the jury that if defendant entered the prosecutrix's bedroom without intent to use force but only formed the intent to accomplish his purpose by force after she screamed, they could return a verdict of guilty of the lesser included offense of non-burglarious breaking and entering.

There was no evidence to support this instruction. State v. Watson, *supra*; State v. Bryant, *supra*; State v. Carnes, *supra*.

Further the instruction which defendant claims was erroneously omitted is in the nature of a contention. The instruction was not requested by defendant's counsel and if given, would have run counter to his sole defense of alibi.

These assignments of error are overruled.

Defendant also contends that the instructions on the charge of rape were erroneous in that they did not sufficiently describe the required degree of resistance and relate it to the facts of this case.

In the case of State v. Vicks, 223 N.C. 384, 26 S.E.2d 873, Judge Bone charged the jury as follows:

". . . if the State has, by evidence, satisfied the jury beyond a reasonable doubt that this defendant had carnal knowledge or sexual intercourse, the two terms being synonymous, with the prosecuting [illegible] by force and violence, and against her will, it would be your duty to return a verdict of guilty of rape, as charged in the bill of indictment, . . ."

Finding no error in the charge, this Court stated:

"When the whole charge is considered contextually, it is plain and leaves the jury no option to convict the defendant of rape if the evidence failed to satisfy them beyond a reasonable doubt of each of the essential elements of the offense. . . ."

In addition to the [illegible] noted in the preceding assignment of error, Judge Webb in his charge to the jury on the rape charge stated:

"I charge you if you find from the evidence and beyond a reasonable doubt that on or about June 18, 1973, the defendant Alton James Henderson by the use of force or threat of force had sexual intercourse with Judy Ann Strader without her consent and against her will, it would be your duty to return a verdict of guilty of rape. If you do not so find or have a reasonable doubt as to one or more of these things, you will find the defendant not guilty of rape."

[35] We think that the instruction on the charge of rape was correct and was given in a manner calculated to aid the jury in understanding the case and in reaching a correct verdict.

Defendant objects to the trial judge's failure to include in his charge certain evidence which defense counsel elicited on cross-examination.

Defendant points to the following omissions which he claims favored defendant, to wit:

"1. That she is nearsighted and need glasses. That she was not wearing glasses when her attacker was standing in the doorway. (R p 28)

2. That the prosecuting witness had a look at Alton Henderson in police custody for five minutes before she was able to recognize him. (R p 29)

3. That the prosecuting witness did not notice the next day that any injury was done to the door or the locks. (R p 32)

4. That she was unable to recognize the color of the shirt of the man attacking her. (R pp 33-34)

5. That the prosecuting witness had made an earlier statement inconsistent with her statement that she was knocked out of the bed. (R p 42)"

[36] The general rule is that objections to the charge in stating contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford opportunity for correction. However, this rule does not apply where contentions are given by the Judge which are based on unintroduced evidence, which erroneously recite defendant's testimony, or which misstate the burden of proof to defendant's prejudice. See 3 N.C. Index 2d, Criminal Law § 163, and cases there cited.

The matters of which defendant complains are within the general rule requiring counsel to bring their omission to the court's attention. It should also be noted that the record reveals that at the time prosecuting witness stated she was nearsighted, she also stated, "I know I see very

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That the prosecuting witness did not
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five minutes before she identified
recognizing him. [Tr. p. 39]

That the prosecuting witness did not
ify the exact day that any injury was
e to her eye or eyes. [Tr. p. 37]

That she was unable to recognize the
lor of the shirt of the man attacking
r. [Tr. p. 29]

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well close with my glasses off, with the glasses off I do not see distances." The other more compelling omission concerning the length of time that she observed defendant at the confrontation at the Sheriff's Department was explained in the following manner:

"A. Sir, I knew the moment I saw him that he was, but I stood there and looked because I knew how important it was, and I wanted to make very sure in my own mind if that was the man."

[37] Whether prosecuting witness recognized the color of her assailant's shirt, caused the damage to her left eye and made inconsistent statement concerning being knocked off the bed by her assailant do not appear to be of crucial importance to defendant's defense.

Certainly a contextual reading of the entire charge fails to show that the charge was weighted in favor of the State or that the omission of the matters here complained of amounted to an expression of opinion by the trial judge in violation of G.S. § 1-180.

This assignment of error is overruled.

Finally, defendant contends that the death sentence was illegally imposed and that it constituted cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution.

[38] In State v. Waddell, *supra*, this Court declared that upon conviction, the death penalty would be imposed upon any person who committed the crimes of larceny in the first degree, first degree murder, arson or rape after 18 January 1973. On 25 February 1971, this Court decided the case of State v. Jarrette, N.C., 282 S.E. 2d 721. In *Jarrette* the Court reaffirmed the holding in *Waddell* and answered all the viable contentions presented by defendant's brief and argument concerning the death penalty. See also State v. Dillard, *supra*, and State v. Noell, *supra*.

We have again carefully considered all of the arguments which were forcefully presented by defendant's counsel. However, we do not find them sufficiently persuasive to warrant disturbing the holdings in *Waddell* and *Jarrette*.

Because of the imposition of the death penalty in this case, we have carefully examined the entire record and every contention and argument proffered by defendant. Our examination discloses that defendant received a fair trial, free from prejudicial error.

No error.

BOBBITT, C. J., and HIGGINS and SHARP, JJ., dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in State v. Jarrette, N.C., 282 S.E.2d 721 (1981).

STATE of North Carolina

v.

Joe BRYANT.

STATE of North Carolina

v.

Raymond Mitchell FLOYD.

No. 24.

Supreme Court of North Carolina.

March 13, 1974.

Defendants were convicted before the Superior Court, Mecklenburg County, John R. Friday, J., of intentionally disseminating obscenity in public place, and they appealed. Following finding of no error by Court of Appeals, 16 N.C.App. 456, 192 S.E.2d 693, and dismissal of appeal and de-

Supreme Court

JUN 10 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6853

ALTON JAMES HENDERSON,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

Petitioner's Motion to Grant Summarily, Vacate, and Remand

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Attorney for Petitioner

IN THE

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ALTON JAMES HENDERSON,

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STATE OF NORTH CAROLINA,

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On March 13, 1974, the Supreme Court of North Carolina affirmed petitioner's convictions and death sentences for rape and first degree burglary, and a petition for certiorari has been filed in this Court. Petitioner respectfully moves this Court to grant the petition summarily, vacate these judgments, and remand the case to the Supreme Court of North Carolina for consideration in the light of developments there subsequent to the affirmance of petitioner's convictions and death sentences.

1. At petitioner's trial, during the course of the jury's deliberations, the jury foreman returned to the courtroom and stated to the court that the jury "would like further instructions regarding the punishment and whether or not [it could] make a recommendation." R. at C. 19. The trial court, which had not informed the jury previously of the possible

punishment that could be imposed on petitioner if he were found guilty, replied:

> "I will instruct you the penalty [illegible] imposed is really not your concern. Your function is to pass on the guilt or not guilt [sic] as to both counts. So, I will not instruct you on what the penalty will be, that is not a concern of yours. As far as the recommendation is concerned, you cannot make a recommendation. You find him guilty or not guilty according to the evidence and the instructions I have given you."

at C. 19-C.20.

2. On appeal to the Supreme Court of North Carolina, petitioner urged that the trial court had erred by "[f]ailing to inform jury that verdict of guilty meant death." Brief of Appellant at 2. The Court rejected that claim, ruling that "[t]he sole responsibility of the jury is to decide the guilt or innocence of the accused without being hindered by the quantum of punishment possible, probable or certain upon conviction . . . . We hold that the trial judge properly refused to instruct the jury as to the punishment which would result from a conviction of rape or first degree burglary." State v. Henderson, 285 N.C. 1, 203 S.E. 2d 10, 23 (1974).

3. Subsequent to the decision in petitioner's case, the Supreme Court of North Carolina considered a similar question in State v. Britt, No. 36 (Robeson County)(May 15, 1974)(appended to petition for certiorari as Appendix D), and came to an opposite result. In Britt, a homicide case where the trial court had not described the punishments which would be imposed subsequent to a conviction but had charged that it could convict

BEST COPY AVAILABLE

of involuntary manslaughter, voluntary manslaughter, second degree murder, or first degree murder, the jury returned a verdict of "first-degree murder, with mercy" (slip opinion at 12). The trial judge refused to accept the recommendation of punishment and imposed the death sentence mandated in such cases by State v. Waddell, 282 N.C. 431, 194 S.E., 2d 19 (1973), ruling that:

> "This is not a possible verdict. The verdict must be either guilty of murder in the first degree or guilty of whatever you find him guilty of. The Court will not accept the recommendation of the Jury as to punishment in the matter, for punishment is entirely for the Court."

Slip opinion at 12. Appellant Britt assigned this ruling as error, and the Supreme Court of North Carolina agreed, reversing appellant's conviction and sentence of death and granting a new trial. The Court ruled that although State v. Waddell, supra, did not permit counsel to argue the issue of punishment to the jury, a jury's confusion about the punishment which could be imposed afforded a "compelling reason" for the trial judge to instruct the jury as to the consequences of a verdict that would result in a "mandatory" death penalty. The Court held that:

> "In (sic) instant case, when the jury returned a verdict of "first degree murder, with mercy", it became apparent that the jurors were confused as to the law and as to their duties as jurors. At that point the trial judge should have informed them that under existing law, neither the jury nor the court had any discretion as to punishment if the jury returned a verdict of guilty of first degree murder.....The gravity of this case, and the apparent confusion and uncertainty among the jurors when the unaccepted verdict was returned, demanded more clarification as to possible verdicts than the statement: 'The verdict must be either guilty of murder in the first degree or guilty of whatever you find him guilty of.'"

Slip opinion at 16-17.

4. In BRITT the jury came back with a recommendation of mercy and were told that punishment was none of their business. In HENDERSON the jury sent out a similar message asking whether they could make a recommendation and got the same answer. There is simply no way to distinguih BRITT from HENDERSON, and the Supreme Court of North Carolina did not attempt to. It stated that the result reached in this case now under Petition for Certiorari was the result of the "compelling reason" doctrine not being brought into focus:

> "We did not discuss the question of whether such compelling reasons existed as to require disclosure of punishment." (slip opinion p. 15)

And, although the court was too kind to say so, defendant would have been given a new trial below if counsel had spent less time arguing constitutional rights and more time seeking to accomodate, under the compelling reason doctrine, the FURMAN prohibition against jury discretion with the right of a juror not to take a life unknowingly.

5. The Supreme Court of North Carolina does not entertain rehearing petitions in criminal cases. State v. Council, 129 N.C. 511, 39 S.E. 814 (1901). Thus, at this stage of the proceedings, petitioner is unable to present the Supreme Court of North Carolina with the question of whether State v. Britt mandates a new trial for petitioner.

6. This petition presents important constitutional stions concerning the administration of criminal justice and the permissibility of imposing capital punishment. Since the Court has traditionally declined to "anticipate a question of constitutional law in advance of the necessity of deciding it," Liverpool Steamship Co. v. Emigration Commissioners, 113 U.S. 33, 39 (1885), it should avoid a premature consideration of these questions, when the grant of a new trial by the North Carolina Supreme Court might moot them. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-350 (1936) (Brandeis J. concurring).

7. There is clear precedent for the extraordinary action which petitioner requests. In Hunter v. Tennessee, 403 U.S. 711 (1971), the Court summarily granted four petitions for certiorari, vacated judgments of the Tennessee Supreme Court affirming death sentences for rape, and remanded the cases for reconsideration. While these cases were pending in the Tennessee Supreme Court, this Court had decided Witherspoon v. Illinois, 391 U.S. 510 (1968), but petitioners were unable to raise Witherspoon questions in the State supreme court because of Tennessee's appellate rules. While the cases were pending on certiorari, Tennessee amended these rules by statute, and this Court held that "sound judicial administration," 403 U.S. at 712, required that the petitions be granted and vacated summarily and the cases remanded to the Tennesse Supreme Court. The Court was careful, however, to intimate

no view on the merits of petitioners' claims or "as to the applicability of the new Tennessee statute to these cases." Ibid. Cf. Aikens v. California, 406 U.S. 813 (1972. For other cases in which this Court has summarily granted certiorari, vacated, and remanded, to allow a State Supreme Court to reconsider an issue in the light of a State law amendment subsequent to its decision in petitioner's case, see Watts v. Seward School Bd., 381 U.S. 126 (1965); Case v. Nebraska, 381 U.S. 336 (1965); Bell v. Maryland, 378 U.S. 226 (1964). Cf. Walton v. Arkansas, 371 U.S. 28 (1962).

8. The disposition petitioner requests is particularly appropriate in view of those cases where the Court has vacated and remanded for consideration of State law questions after granting certiorari, requiring the filing of briefs, and hearing oral argument. See Patterson v. Alabama, 294 U.S. 600 (1935); Williams v. Georgia, 349 U.S. 375 (1955). In Patterson v. Alabama, supra, at 607, this Court held that "in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." See also Villa v. Van Schaick, 299 U.S. 152, 155 (1936). Efficient judicial administration requires that the Supreme Court of North Carolina now be afforded an opportunity to examine its decision in petitioner's case in light of its subsequent holding in Britt before further proceedings in this Court. See Smith v. Pennsylvania, 376 U.S.

354 (1964).

Conclusion

For the foregoing reasons, petitioner urges that the Court summarily grant the petition, vacate the judgment and remand to the Supreme Court of North Carolina for reconsideration.

Respectfully Submitted,

W. R. Dalton, Jr.

W. R. Dalton, Jr.
Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that on this 7 day of June, 1974 I served 3 copies of the foregoing "Petitioner's Motion to Grant Summarily, Vacate and Remand" upon the Attorney General of North Carolina, the Hon. Robert Morgan, P. O. Box 629, Raleigh, North Carolina 27602 by depositing same in the United States mail, postage prepaid.

W. R. Dalton Jr.

W. R. Dalton, Jr., Esq.

Supreme Court, U. S.
FILED
SEP 23 1974
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-6877

HENRY N. JARRETTE,
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BILLY HONEYCUTT,
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Respondent.

* *
RESPONSE OF THE STATE OF NORTH CAROLINA
TO PETITIONS FOR WRITS OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA
* *

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Dated: September 20, 1974

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• •

RESPONSE OF THE STATE OF NORTH CAROLINA
TO PETITIONS FOR WRITS OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

• •

Pursuant to Rule 23(5) of the Rules of the Supreme Court, respondent files herewith its consolidated response to the captioned petitions for writs of certiorari to the Supreme Court of North Carolina. They each seek certiorari to the same court and involve an identical question, as well as other closely related questions.

The State of North Carolina, respondent, has no objection to this court issuing writs of certiorari to the Supreme Court of North Carolina in the captioned cases, limited to the single question of whether the State's imposition of death by administering lethal gas to duly convicted first degree murderers and rapists who consummate the rape by force and violence, constitutes "cruel and unusual" punishment within the meaning of the Eighth Amendment to the Constitution of the United States of America.

The respondent acknowledges there may be special and important reasons for granting the writs (Rule 19(1), Rules of the Supreme Court). Among these are: (1) This State's highest court has answered the foregoing federal question of substance in the negative and the question has not heretofore been directly determined by this court; and (2) even though the constitutionality of the death penalty per se has been heretofore recognized by this court, the recent decision in Furman v. Georgia, 408 U.S. 238, 33L.Ed. 2d 346, 92 S.Ct. 2726 (1972) has cast an uncertain light upon this court's construction of the State's power to define criminal conduct and prescribe punishment for those engaging in such conduct, which power was specifically reserved to the States pursuant to the Tenth Amendment to the Constitution of the United States of America.

OPINIONS BELOW

The opinions of the Supreme Court of North Carolina, in the captioned cases listed in the chronological order of these decisions are:

1. State of North Carolina v. Henry N. Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974).
2. State of North Carolina v. Tommy Noell, 284 N.C. 670, 202 S.E. 2d 750 (1974).

3. State of North Carolina v. Alton James Henderson, 285 N.C. 1, 203 S.E. 2d 10 (1974).

4. State of North Carolina v. Albert Crowder, Jr., 285 N.C. 42, 202 S.E. 2d 38 (1974).

5. State of North Carolina v. David Earl Dillard, 285 N.C. 72, 203 S.E. 2d 6 (1974).

6. State of North Carolina v. Jesse Thurman Fowler, 285 N.C. 90, 203 S.E. 2d 803 (1974).

7. State of North Carolina v. Billy Honeycutt, 285 N.C. 174, 203 S.E. 2d 844 (1974).

JURISDICTION

Petitioners seek to invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1257 (3), by alleging a deprivation of rights that they contend are secured by the Constitution of the United States of America.

QUESTIONS PRESENTED

I. Is capital punishment, ipso facto, cruel and unusual punishment within the meaning of the Eighth Amendment to the Constitution of the United States of America? (Petitioners' Question No. 1, in each of the captioned petitions, except Henderson. Petitioner Henderson's Question Nos. 6-10).

II. Were the petitioners' constitutional rights to procedural due process observed by North Carolina at the pre-trial, trial and appellate stages of the proceedings?

A. At the Pre-trial Stage.

1. Were the Constitutional rights exemplified in Miranda vs. Arizona, 384 U.S. 436 (1966), observed by North Carolina in admitting into evidence extra-judicial statements? (Petitioner Jarrette's Question No. 4).

2. Is constitutional due process violated where police do not investigate, ad infinitum, every possible shred of evidence thought by a defendant to have some relationship to the crime with which he is charged? (Petitioner Noell's Question No. 4; Petitioner Henderson's Question No. 14).

3. Does the concept of constitutional due process prohibit police use of a "show up" identification procedure during the investigative stage of the case? (Petitioner Henderson's Question Nos. 1 and 3).

4. Does constitutional due process in a mandatory death penalty case require the state to seat a juror who has testified on voir dire that because of his personal beliefs he would not return a verdict of guilty, even if satisfied from the evidence beyond a reasonable doubt as to the defendants' guilt? (Petitioner Noell's Question No. 2; Petitioner Jarrette's Question No. 2).

5. Does constitutional due process require the state to furnish a transcript of the voir dire examination of the jury to the defendant even though he has not requested such a transcript? (Petitioner Honeycutt's Question No. 2).

6. Does constitutional due process require that a jury include black members where the defendant is a black, even though there is no systematic exclusion of blacks from jury service? (Petitioner Noell's Question No. 5).

7. Does constitutional due process require a change of venue for the trial of a criminal case merely upon the showing of wide publication of the crime involved? (Petitioner Jarrette's Question No. 4).

B. At the Trial Stage.

1. Does the constitutional concept of due process require the exclusion of evidence of an independent in-court identification of the defendant as the perpetrator of the crime by the rape victim simply because the victim had previously identified the defendant as the perpetrator in a "show-up" during the investigation of the crime by the law officers? (Petitioner Henderson's Question Nos. 2, 4 and 5).

2. Does the constitutional concept of due process require a mistrial where a witness spontaneously and voluntarily gives evidence of a non-inflammatory nature and the trial judge immediately orders the testimony stricken and instructs the jury to disregard the spontaneous utterance of the witness? (Petitioner Noell's Question No. 4; Petitioner Crowder's Question No. 2).

3. Does constitutional due process require the trial judge to instruct the jury that if the jury convicts the defendant of rape the punishment shall be death, where neither the judge nor the jury have any discretion as to punishment upon conviction of a capital crime? (Petitioner Henderson's Question Nos. 11 and 12).

4. Does constitutional due process require that the state permit defense counsel to argue the propriety of the death penalty to the jury when neither the judge nor the jury has any discretion as to punishment upon conviction of a capital crime? (Petitioner Dillard's Question No. 2).

5. Does constitutional due process require the trial judge to instruct the jury as to lesser included offenses when the charge laid in the indictment and all of the state's evidence introduced at trial tends to prove that only the capital offense, if any, was committed? (Petitioner Henderson's Question No. 13).

C. At the Appellate Stage.

1. Does the concept of constitutional due process require that the state assume the burden of proving the negative of any issue raised by a defendant on appeal in a capital case? (Petitioner Henderson's Question No. 10).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Constitutional Provisions.

A. These cases involve the Eighth, Tenth and Fourteenth Amendments to the Constitution of the United States of America which provide, inter alia:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (U.S. Const. amend. VIII).
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people. (U.S. Const. amend. X).
>
> . . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const. amend. XIV, §1.).

B. Additionally they involve the Constitution of North Carolina, Article XI, which provides:

> §2. Death punishment. The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact.

II. Statutory Provisions.

These cases also involve the following provisions of the General Statutes of North Carolina as construed by the North Carolina Supreme Court in State v. Waddell, 282 N. C. 431, 194 S. E. 2d 19, (1973) applying this court's decision in Furman v. Georgia, 408 U.S. 238 (1972):

A. N. C. General Statute § 4-1. Common Law declared to be in force.-

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

B. N. C. General Statute §14-17. Murder in the first and second degree defined; punishment.-

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: *Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.** All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

C. N. C. General Statute § 14-21 Punishment for rape.

> Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more, by force and against her will, or who is convicted of

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* Subsequent to this Court's decision in Furman, the North Carolina Supreme Court in State v. Waddell 282 N. C. 431, 194 S.E. 2d 19 (1973) declared the portions set forth in italics above were unconstitutional.

unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the Court shall so instruct the jury.*/

D. N. C. General Statute §15-187. Death by administration of lethal gas. -

Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.

E. N.C. General Statute §15-188. Manner and place of execution.-

The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead. . . .

STATEMENT OF THE CASE

Considering that petitioners are each in extremis, the hyperbolic and vituperative content of their petitions is understandable even though unsupported by the evidence of record, the facts found arising from that evidence or the law itself as applied in North Carolina. Thus respondent will bypass the invective and respond only to the merits of the questions raised.

However, respondent notes the petitions are replete with references to other states' statutes and their interpretations by the highest courts of those states. As North Carolina spends full time enforcing its laws in a positive manner, it deems it unnecessary to respond to other states' actions as portrayed to this court by petitioners. After all, it is North Carolina's laws which petitioners violated and it is North Carolina which will enforce those laws which are ultimately held to be in accordance with the Constitution of the United States by this court.

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* Subsequent to this Court's decision in Furman, the North Carolina Supreme Court in State v. Waddell 282 N.C. 431, 194 S.E. 2d 19 (1973) declared the portions set forth in italics above were unconstitutional.

1. The Jarrette case, No. 77-6977 [284 N.C. 625, 202 S.E.2d 721 (1978)].

Henry Jarrette, a black man, was an escaped murderer. Within 48 hours of his escape he raped, by force and violence, Gwendolyn Blackmon, an unarmed and helpless sixteen year old black girl. Shortly thereafter he murdered David Parker, an unarmed and helpless sixteen year old white boy by plunging a knife into his chest. Jarrette was sentenced to death for each of the foregoing crimes.

Before escaping, Jarrette was in prison serving life sentences for two different murders. Through a program inspired by humanitarian values and based upon the concept that a convicted felon might, given a reasonable opportunity, be rehabilitated; the N.C. Department of Corrections and the N. C. Junior Charber of Commerce developed a furlough program whereby Jaycee units were established within the prison system of North Carolina. Such a Jaycee unit was established in the custodial institution to which Jarrette was assigned.

Jarrette rose to the office of president of his local Jaycee unit and was nominated for an award for his work there. He was escorted by a prison guard to the state's capital to receive an award. Notwithstanding that he would be eligible for parole after serving 20 years of his life sentence for murder,* Jarrette escaped.

Within 48 hours, Jarrette had kidnapped and raped Gwendolyn Blackmon. He rode around in her car, holding her hostage, until he could find another car. He told her she was lucky she was black, for if she were white he would kill her.

Jarrette then observed a car parked at a laundromat occupied by a single occupant, sixteen year old David Parker. Jarrette approached Parker's car and said something to Parker while standing at the driver's open window. Jarrette reached into the open window and stabbed Parker to death.

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* §148-58. Time of eligibility of prisoners to have cases considered. - All prisoners shall be eligible to have their cases considered for parole . . .any prisoner serving sentence for life shall be eligible for such consideration when he has served 20 years of his sentence.

Jarrette fled the state and was captured by agents of the FBI in Tennessee. They warned him of all his rights guaranteed to him by the Constitution of the United States. Jarrette confessed. He was returned to North Carolina, furnished astute counsel at every stage of the judicial proceedings charged, and tried by a fair and impartial jury.

Jarrette was convicted and sentenced to die in the gas chamber at the state's prison in Raleigh by administration of lethal gas.

Appeal to the Supreme Court of North Carolina of any sentence of death is mandatory by the law of North Carolina. Appeal was had and affirmed.

2. The Noell case, No. 77-6870
[288 N. C. 628, 242 S. E. 2d 750 (1978)].

Terry Noell is a black male who by force and violence raped Linda DiCenzo, a young white female practical nurse.

Noell gained entry into Miss DiCenzo's apartment by trick in the late morning hours, having followed her home around 8:30 a. m. after she had gotten off work at N. C. Memorial Hospital in Chapel Hill, N. C.

Noell brutally beat Miss DiCenzo and choked her until she submitted. The degree of violence to her body was fully described by the testimony of impartial witnesses.

Noell was fully identified by his victim as the perpetrator of the crime which occurred during full daylight hours. There was other corroborative evidence of his presence at the scene of the crime at the time it occurred.

Noell never confessed to the crime. His defense was an alibi which was never established. After receiving all of the procedural safeguards guaranteed to him by both North Carolina and Federal Constitutions and Acts of the North Carolina General Assembly, Noell was convicted and sentenced to die. His conviction was affirmed upon appeal.

7. The Henderson case. No. 77-6953
[295 N.C.1, 243 S.E.2d 10 (1978)]

Alton James Henderson is a white male who by force and violence raped Judith Strader a white woman. Henderson entered Miss Strader's home in the late evening while she was asleep.

Henderson was able to consumate the rape only after Miss Strader had torn her fingernails from her hands in resistence, and he had severely beaten her and choked her until she thought everything was going to pop out of her head.

After the rape, she talked to Henderson for more than thirty minutes and could see his face clearly from a utility company light outside her bedroom window. There was other corroborative identification of Henderson as the perpetrator of the rape.

Henderson never confessed, but like Jarrette, Henderson fully received the benefits of all constitutionally guaranteed safeguards as established by both the North Carolina and United States Constitutions, as well as those procedural safeguards established by the Acts of the N. C. General Assembly and the decisions of the North Carolina Supreme Court.

He had astute counsel. Upon being convicted, he was sentenced to die. Upon appeal to the Supreme Court of North Carolina no prejudicial error was found to have occurred in his trial. His conviction and sentence were therefore affirmed.

8. The Crowder case. No. 77-6878
[295 N. C. 42, 243 S. E. 2d 98 (1978)]

Albert Crowder, Jr., a black man, shot and killed Penny Bryant, a black woman with a .38 caliber pistol.

Crowder called Miss Bryant, his former girlfriend, out of a house. He told her he had something for her brother, whereupon he shot her in the head, killing her.

He was convicted of first degree murder and sentenced to die. On appeal no prejudicial error was found to have occurred in his trial.

5. The Dillard Case, No. 77-6[illegible]
[295 N. C. 77, 243 S. E. 2d 6 (1978)].

David Earl Dillard, a black man, shot and killed his wife, Mattie Dillard, a black woman, with a shotgun in a church while she was attending church services on an Easter Sunday morning.

Dillard's counsel emphasizes that Dillard made no threatening gestures or hostility to the armed arresting officers subsequent to the killing. Perhaps they seek to demonstrate his kindly and worthwhile character after he had completed his mission of cold blooded murder.

Dillard too, as was his right, received at each step of the proceedings against him the best defense and most impartial administration of justice man has been able to devise.

He too was convicted by a jury of his peers and was sentenced to die in the gas chamber and this sentence was affirmed.

6. The Fowler Case, No. 77-7031
[295 N. C. 84, 243 S. E. 2d 893 (1978)]

Jesse Fowler, a black man, had an argument and fist fight with John Griffin over a ten dollar bill. Fowler, after a sufficient cooling off period went to his home. Fowler took a .38 pistol and shot Griffin to death. A few hours later, at the urging of his wife and a friend, Fowler went to the police to explain what happened. He was advised of his rights, and waived them, indicating his desire to make a statement without the presence of counsel. Fowler was duly tried, convicted and sentenced to death. On appeal, no prejudicial error was found by the N. C. Supreme Court and the judgment was affirmed.

7. The Honeycutt Case, No. 77-7033
[295 N. C. 635, 582 S. E. 2d 888 (1978)]

Just prior to June 6, 1977, Billy Honeycutt, a black man, his wife, Brenda, a black woman, and their nine year old daughter, Billy Jean, lived together in a trailer. At least three days prior to the date on which Billy killed his wife, he told friends

that he was going to kill her. Then, on June 6, 1973, Billy told his wife, "If I can't have you, then no one can." He then took a butcher knife from his pants and stabbed his wife repeatedly as she tried to flee down the hall. Defendant's daughter, Billie Jean, ran to a neighbor's house to get help for her mother. The Duplin County sheriff's department was called and Deputy Sheriff Procter responded. He testified that when he arrived he found the body of Brenda in the trailer. He found Honeycutt on the premises and advised him of his constitutional rights. Upon being told that she was dead Honeycutt said, "Ha, I'm damn glad of it."

ARGUMENT

I. The Decisions below are Clearly Correct.

A. CAPITAL PUNISHMENT, PER SE, IS NOT CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The proscription of cruel and unusual punishment is applicable to the states through the Due Process clause of the Fourteenth Amendment. Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962). The North Carolina Supreme Court so held in State v. Waddell, 282 N.C. 431, at page 436, 194 S.E.2d 19(1973).

Since the beginning of the United States as a separate nation two hundred years ago, death sentences have been administered by both the federal and state governments for a variety of crimes. As the North Carolina Supreme Court noted in Waddell, id. at page 436:

> Prior to the decision in Furman v. Georgia the United States Supreme Court implicitly approved or, albeit in dictum, expressly upheld the constitutionality of capital punishment in many cases, including Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed 345 (1879); In re Kemmler, 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890); Weems v. United States, 217 U.S. 349, 58 L.Ed. 793, 30 S.Ct. 544 (1910); Louisiana ex rel. Francis v. Resweber,

329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947); Trop v. Dulles, 356 U.S. 86, 2 L.Ed. 2d 630, 78 S.Ct. 590 (1958); Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968); McGautha v. California, 402 U.S. 183, 28 L.Ed. 2d 711, 91 S.Ct. 1454 (1971). Thus, since the ratification of the Eighth Amendment one hundred eighty-one years ago, no decision of the United States Supreme Court prior to Furman casts the slightest doubt on the constitutionality of capital punishment.

Nor is there reason to believe this court now considers capital punishment to be cruel and unusual punishment, per se, within the meaning of the Eighth Amendment. In Furman v. Georgia, 408 U.S. 238 (1972), the justices of this court went to some length to explain that they did not reach that question.

As the North Carolina Supreme Court noted in the Waddell case:

> "Mr. Justice Douglas. . .wrote. . .'Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach . . .'(282 N.C. at 437).
>
> "Mr. Justice Stewart. . .expressed his views as follows... 'The constitutionality of capital punishment in the abstract is not . . .before us in [Furman]. . .'(282 N.C. at p. 437-438).
>
> "Mr. Justice White. . .depicts his views... [thusly]. . .'I do not at all intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would comport with the Eighth Amendment. . .'(282 N.C. at 438).
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> Four members of the [U.S. Supreme] court dissented [in Furman]. The position of the four dissenters is best summed up by Chief Justice Burger as follows: . . . 'Today the Court has not ruled that capital punishment is per se violative of the Eighth Amendment; nor has it ruled that punishment is 'barred' for any particular class of classes or crimes. . .'(282 N.C. at 439).

Thus, our court having to apply this court's Furman decision in Waddell, at 282 N.C. 439, held:

> The foregoing quotations from the various separate opinions in Furman compel the conclusion that capital punishment has not been declared unconstitutional per se. Rather, the Furman decision holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion.

The Waddell case was tried prior to the Furman decision, and Waddell was sentenced to death. It was the first case to reach the N. C. Supreme Court subsequent to Furman. The N. C. Supreme Court then applied this court's Furman decision to Waddell and ordered his death sentence be vacated and that he be sentenced to life imprisonment, 282 N. C. at 887.

The N. C. Supreme Court further declared unconstitutional the following provisions of N. C. Gen. Stat. §§ 14-17 (murder), 14-21 (rape); 14-52 (burglary); and 14-58 (arson):

> Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.

For the reasons set forth in its opinion, our court demonstrated that the proviso clause was clearly severable from the clause setting forth the punishment as established by the General Assembly. See Waddell, 282 N. C. at pages 841-845.

The Waddell decision thus left death as the only permissible punishment in North Carolina for the crimes of first degree murder, rape, burglary and arson. The North Carolina Constitution of 1970 specifically provided for such punishment.

Our court in Waddell went even further to protect the constitutional rights of its citizens against Ex Post Facto laws, for at 282 N. C. at page 846, it held:

> North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to the date of this decision but shall be applied to any offense committed after such date. (Emphasis added).

Thus, it can be seen that petitioners' assertion that the North Carolina Supreme Court has attempted to evade the Furman decision by "tortured" reasoning and "similar manipulations" designed "to emasculate a constitutional decision of the U. S. Supreme Court" constitute journalistic license more common to editorial excesses than reasoned and responsible arguments in a court of law.

II. THE NORTH CAROLINA GENERAL ASSEMBLY HAS CONSISTENTLY DECREED THE DEATH PENALTY FOR FIRST DEGREE MURDER AND RAPE FOR NEARLY TWO HUNDRED YEARS. IN 1970 IT REAFFIRMED THAT POLICY.

In 1778, the State of North Carolina enacted what is now codified as G. S. 4-1 which states:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the Common Law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

As both murder and rape were capital felonies under the common law, they became so in North Carolina in 1778. Thus death has been the punishment for murder in the first degree and rape in North Carolina for nearly two hundred years. Waddell, supra at p. 881.

It was in 1949 that our present statutes providing for punishment in capital cases were amended. Prior to that time the punishment was death.

The amendments to each of our capital punishment statutes added the proviso which (1) empowered the jury in its discretion to recommend and thus to fix the punishment at life imprisonment, and (2) required the trial judge to so instruct the jury. Waddell, supra at 881.

The legislative history of the subject is succinctly set forth in the Waddell decision at pages 881 and 882, as follows:

> Since the 1949 amendment adding the proviso, seventeen bills or resolutions have been introduced in the General Assembly of North Carolina designed to abolish or limit the imposition of the death penalty for rape or other capital offenses. See House Bills 938, 935, 937 and 939 in the 1955 Session; House Bill 113 in the 1961 Session; House Bill 35, Senate Bill 27 and Senate Resolution 17 in the 1963 Session; House Bills 102 and 251 in the 1965 Session; House Bills 69, 71, 139 and 318 in the 1967 Session; House Bill 160 in the 1969 Session; and House Bill 327 and Senate Bill 251 in the 1971 Session. All of these bills and resolutions failed to receive a favorable report from the committee to which referred, or were tabled or defeated on the floor of the House in which introduced.

The new State Constitution, which was ratified by the people in the general election of 1970, retained the provision contained in the former Constitution of North Carolina authorizing the General Assembly to provide by statute for the imposition of the death penalty for murder, arson, burglary and rape. See Constitution of North Carolina, Article XI, Section 2. Thus, there is nothing in the legislative or constitutional history of this State to indicate an intent by the Legislature, or by the people, to reduce the punishment for rape from death to life imprisonment, or to indicate that the 1949 proviso was enacted for that purpose except upon the discretionary recommendation of the jury, or to indicate that such proviso would have been enacted at all had its unconstitutionality been foreseen by the 1949 General Assembly. Rather, such history demonstrates a constant intent by the people and their representatives to retain the death penalty for murder, arson, burglary and rape notwithstanding the proviso added in 1949.

It is the proviso, and the proviso alone which creates the discretionary difficulty condemned by the Furman decision and it is quite clear that Furman strikes down the proviso; as violative of the Eighth and Fourteenth Amendments.

The question which the North Carolina Supreme Court was confronted with was:

> Does the remainder of G. S. 14-21 stand alone with death as the mandatory punishment for rape? Or, is the proviso such a constituent and inherent part of a single statutory scheme of punishment that it is inseverable and the entire statute must fall?

It was the sole duty and responsibility of our Supreme Court to answer that question. Justice Lake, speaking in a concurring opinion in Waddell, summed up that duty as concisely as can be done at 282 N. C. 88f and 89a. He said:

> The Supreme Court of the United States being the higher authority on the validity of judgments under the Constitution of the United States, its mandates, issued in reliance upon Furman v. Georgia, 408 U. S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, vacating the death sentences previously affirmed by this Court in the five cases cited in the opinion of Justice Bobbins, became the law of those five cases. Under the compulsion of those mandates, this Court remanded those cases to the respective superior courts for the imposition of sentences of life imprisonment.
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> The present case, on the contrary, is before us for the first time. In it we have no mandate from the Supreme Court of the United States vacating the death sentence imposed upon this defendant. In the absence thereof, it is our duty, not that of the Legislature, to determine just what the United States Supreme Court decided in Furman v. Georgia, supra, and to determine the present state of the law of North Carolina with reference to punishment for the crime of rape in the light of that decision.

> Only this Court can determine whether any portion of G. S. 14-21 is the law of North Carolina today and, if so, which portion. The Legislature , now in session, cannot make that determination. The Legislature can determine what the law of this State ought to be and shall be in the future. That is policy making and that is the Legislature's prerogative and responsibility. It is for us, and for us alone, to determine what part of G. S. 14-21, if any, is the law of North Carolina today and determinative of the validity of the sentence from which this defendant appeals. That is not policy making but the interpretation of the statute - an exercise of the judicial functica which we may not abdicate or assign to the Legislature. Constitution of North Carolina, Art. I, § 6; Art. IV, §1

> It is quite clear, as the opinion of Justice Huskins plainly states, that it is for the Legislature, not for this Court, to determine the policy of this State as to what acts shall be deemed crimes and as to the punishment therefor; that is, to determine what punishment ought to be and shall be imposed for the offense of rape, hereafter committed. Constitution of North Carolina, Art. I, § 6; Art. II, § 1; Art XI, § 2. But the Legislature has spoken in G. S. 14-21 and, until it speaks again, it is the duty of this Court to determine what, if anything, remains of its pronouncement in G. S. 14-21 after the decision in Furman v. Georgia, supra. No officer or agency, save this Court, can make that determination.

> ...Whether a statute is separable or inseparable is a question of statutory interpretation. It is well settled that the interpretation of a state statute is a question to be determined by the supreme court of the state. The Supreme Court of the United States has repeatedly accepted as binding upon it the interpretation placed upon state statutes by the highest courts of such states.

> Thus, the Supreme Court of the United States has not said, and may not properly determine that G.S. 14-21 is or is not separable. What it has said in Furman v. Georgia, supra , is that the discretion which the proviso in G.S. 14-21 undertook to vest in North Carolina juries cannot be conferred upon them consistently with the Fourteenth Amendment. It having so held, it is now the prerogative and duty of this Court, and this Court alone, to determine whether the proviso is severable from the original statute unto which the proviso was attached by amendment in 1949. Thus, it is the date of the decision of that question by this Court -- today -- not the date of the decision in Furman v. Georgia, supra, which fixes the offenses of rape for which a death sentence may be imposed without running afoul of the Ex Post Facto principle.

The Supreme Court of North Carolina answered the question it was confronted with in Waddell as follows:

> The original portion of G.S. 14-21 with its mandatory death penalty for rape stood alone and was given full effect by the courts of this State for a century prior to the enactment of the 1949 proviso. Grammatically, as well as historically, the two portions of the statute are distinct and separate and the constitutional invalidity of the added portion will not destroy the part which was in existence prior to the enactment of the unconstitutional portion. (282 N. C. at 882-883).
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> In light of the authorities cited, we hold that the unconstitutional proviso in G.S. 14-21 is severable and the remainder of the statute with death as the mandatory punishment for rape remains in full force and effect. (282 N. C. at 884-885).
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> • • • •
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> We recognize that the Legislature, not the courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the law-making authorities rather than the courts. In view of the decision in Furman, the Legislature may wish to delete the unconstitutional proviso from G.S. 14-21 (rape), G.S. 14-17 (murder), G.S. 14-52 (burglary), and G.S. 14-58 (arson); or it may wish to rewrite these statutes altogether to give expression to what it conceives to be the public will. Meanwhile, we hold that the effect of the Furman decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge. (282 N. C. at 885).

In the application of its decision in Waddell, the North Carolina Supreme Court directed that the death penalty could not be imposed on any criminal whether tried or not for any capital offense committed at or before the time of the finding of its decision on January 18, 1973. (282 N. C. at 886). Compare Johnson v. New Jersey, 384 U.S. 719 (1966).

Thus it is seen that except for the citations, petitioners' characterization at pages 23-27 of their petition (Dillard) hardly resembles what actually occurred in the State of North Carolina.

In 1974, the General Assembly did abolish the death penalty for the crimes of burglary and arson. It mandated death for first degree murder or rape.

Each of the petitioners' petitions involve only the crimes of first degree murder or rape.

Jarrette was the first case to reach the Supreme Court for a crime committed subsequent to the Waddell decision.

In the Jarrette case, 284 N. C. 625, 202 S.E. 2d 721 (1974), the North Carolina Supreme Court was requested to reconsider its decision in Waddell. The court did and reaffirmed its decision, id. at page 654.

The Court noted in Jarrette at pages 650-655:

> The determination of what the statutes of this State mean, with reference to the punishment to be imposed for criminal offenses, is a question of State law and the determination thereof by this Court is authoritative. It is not a Federal question. Adderly v. Florida, 385 U. S. 39. . .reh.den., 385 U. S. 1026; Shuttlesworth v. Birmingham, 382 U. S. 87. . . .
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> • • • •
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> The contention of [Jarrette] is that a state statute, which makes it mandatory that a defendant, fairly and lawfully convicted of first degree murder or of rape, be sentenced to death, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.
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> • • • •
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> This is, of course, a Federal question and our determination of it is subject to review by the Supreme Court of the United States, but we must make the initial determination and must do so in the light of decisions heretofore rendered by that Court.

C. THE MERE EXISTENCE OF PROSECUTORIAL DISCRETION, PLEA BARGAINING, AND EXECUTIVE CLEMENCY DO NOT BRING A MANDATORY DEATH PENALTY STATUTE WITHIN THE PROHIBITIONS OF THE FURMAN DECISION.

These questions were raised by petitioners in the North Carolina Supreme Court. As our court noted in the Jarrette case, 288 N. C. at 656:

> Although the mere statement of these contentions, in clear and simple terms, seems sufficient to show their lack of substance, the seriousness with which they are advanced impels us to take note of them briefly.

The court then addressed itself to each of the contentions of Jarrette and its answers are set forth at 288 N. C. 656-666. These are found in Petitioner Jarrette's petition (No. 77-6877), Appendix "A", 202 S.E. 2d 721 at pages 741-747.

The respondent, State of North Carolina, is unable, after research, to improve upon the reasoning and line of authorities set forth in the Jarrette opinion as noted immediately above. Accordingly, respondent adopts that reasoning and line of authorities as its response in this Court to the petitioners' contentions which are set forth in the Dillard Petition (No. 77-6875) at pages 28-51.

D. CONTEMPORARY STANDARDS OF ONE OR MORE STATES OR THE FEDERAL GOVERNMENT CANNOT BE THE BASIS FOR ABROGATING RIGHTS OF OTHER STATES RESERVED TO THEM BY THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court only recently had to resort to first principles of constitutional government as established in the United States of America, United States v. Richard M. Nixon, _____ U.S. _____, 41 L.Ed 2d 1039 (1974):

> Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." Powell v. McCormack, supra, 589, 23 L Ed 2d 491. And in Baker v. Carr, 369 U.S. at 211, 71 Ed 2d 663, the Court stated: "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

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Notwithstanding the deference each branch must accord the others, the "judicial power of the United States" vested in the federal courts by Art III, § 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313.

• • • •

In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 96 L Ed 1153, 72 S Ct 863, 26 ALR2d 1378 (1952) (Jackson, J., concurring).

This Court noted that unreasonable constitutional claims can "upset the constitutional balance of a workable government". (41 L.Ed.2d at 1063).

Of course, the Court in Nixon was addressing itself to allocating the sovereign power between the three branches of the federal government.

Under the regime of constitutional law as established in the United States, the separation of powers and checks and balances as a means to maintain liberty went further than separating only the three branches of the federal government. The constitutional scheme places heavy reliance upon the independence and sovereignity of the states. A. T. Mason, Free Government in the Making, 3rd Ed. Oxford University Press (1965) at pages 140 and 141 observed:

"John Adams [was] certainly among the best-informed men in the country on political science...

• • • •

> Toward the end of his life Adams could take satisfaction in noting that the federal system followed his basic principle to an extraordinary degree, including, as he saw it, no less than eight balances: (1) states and territories against the central government; (2) the House of Representatives against the Senate; (3) the President against Congress; (4) the Judiciary against Congress; (5) the Senate against the President in matters of appointments and treaties; (6) the people against their Representatives; (7) the state legislatures against the Senate; (8) the Electoral College against the people.

Scott, Sovereign States and Suits, (1925) at pages 55-57, observes:

> Without laboring the matter further, it is abundantly clear that the States after the Declaration of 1776 were free, sovereign and independent, and they remained so, in the sense of international law, until they changed that status by their subsequent, and, as we shall see, voluntary act.

When the states changed their status with respect to the new government of the United States they did not surrender their sovereignty nor become mere "quasi-sovereigns". The states granted certain of their powers to the United States of America and as Hamilton stated in The Federalist (No. 45), "The Powers delegated by the proposed Constitution to the federal government are few and defined."

The proposition that the federal government is one of limited powers is so fundamental and so apparent that it needs little elaboration. As stated by Chief Justice Marshall in McCulloch v. Maryland 17 U.S. 316 (1819):

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends . . . found it necessary to urge. That principle is now universally admitted. . . . We admit, as all must admit, that the powers of the [federal] government are limited, and that its limits are not to be transcended."

Justice Story, in Hunter v. Martin's Lessee, 14 U.S. 303, 325 (1816), said:

> "The government, then of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."

There, then can be no dispute that the federal government has no powers beyond those delegated to it in the Constitution. That is, it has only limited sovereignty.

This being so, then where does the remainder of the sovereign power lie? If the answer be "the people" then who has "the people" deemed should exercise the remaining powers of their sovereignty?

The State contends the answer is to be found in the Tenth Amendment to the Constitution.

It is the State's contention that two of the incidents of those sovereign powers reserved to the States are the power to define criminal conduct and to provide for the punishment therefor within the State's territory, limited only by the prohibition against cruel and unusual punishment contained in the Eighth Amendment.

Roscoe Pound in Volume II, Jurisprudence, part 12, Law and the State, at page 317 states:

> As a legal conception, sovereignty seems to mean the aggregate of powers possessed by the ruler or the ruling organs of a politically organized society. Internal sovereignty, then, is the aggregate of the powers of internal control possessed by the ruling organs of the society by virtue of which it is paramount over all action within. According to Sir Frederick Pollock it is the capacity "of making, declaring and amending the law . . . without reference to any other authority and without any legal limit to its own power."
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> • • • •
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> But the idea of sovereignty begins with Bodin. He defined the state (republica) as an association governed by the highest power (suprema majestas) as the "highest power over citizens and subjects, free from laws" (legibus soluta). Its chief characteristic was the power to give law to all citizens.
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> • • • •
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> At common law, social interests were largely secured by a doctrine that the king was parens patriae, father of his country. That is, he was the guardian of public and social interests of all kinds and hence his courts of law and of equity had a general superintendence of all matters where "public rights" (i.e. social interests or public interests) might be jeopardized.
>
> Criminal law is the primary resource of the legal order for securing social interests immediately as such. At common law, although prosecutions were in the name of the king and under the control of the Attorney General to the extent of his authority to enter nolle prosequi. (Pound, III Jurisprudence, Part 14, Scope, Subject Matter of Law, at p. 264).

Pound further discusses Interests in part 14 of Volume III, Jurisprudence at page 218, et. seq. He specifically discusses the interests of the state as a legal entity.

1. Interests of the state as a juristic person.

> No small part of international law is taken up with the interests of states which international law should secure against infringement by other states. Thus it has usually been said that the absolute or natural rights of states, meaning the interests which it is held should be secured, are: (1) The right of self-preservation and independence. This is analogous to the so-called natural rights of physical integrity and personal liberty ascribed to the individual. It is analogous to an individual interest of personality. [and] (2) The right of exclusive legislation and jurisdiction within its territory. This, too, is an interest of personality. It is an interest akin to the interest of the individual in being allowed to manage his own affairs freely. Juristically, it is secured as a liberty....

As the Tenth Amendment is directed toward maintaining the class of interests referred to by Pound as "public interests", id. (Vol. III at page 235), the United States of America is equally obligated to protect the State of North Carolina's exercise of its sovereign rights as it is to protect any other constitutionally protected right whether it be individual or state.

This Court, even if it desired to do so, can no more lawfully abrogate a constitutionally guaranteed right of a State than it can an individual. Thus "contemporary standards" of "society" cannot be a proper basis for abolishing the death penalty under the Eighth Amendment any more than the "contemporary standards" of the McCarthy era could abolish the rights guaranteed to the individual under the Fifth Amendment to the Constitution.

Only by the exercise of the sovereign power of the State through its legislators may the punishment for murder or rape be lessened in North Carolina.

No other body of men and women on the face of this earth are lawfully entitled to exercise that governmental power other than the people of North Carolina, either directly in revolution or by vote on a new Constitution.

II. NO CONFLICT OF DECISIONS BETWEEN THE NORTH CAROLINA COURT AND THIS COURT IS PRESENTED BECAUSE PETITIONERS' CONSTITUTIONAL RIGHTS TO PROCEDURAL DUE PROCESS WERE FULLY OBSERVED BY NORTH CAROLINA AT EACH STAGE -- PRETRIAL, TRIAL AND APPELLATE -- OF THE PROCEEDINGS.

In responding to the contentions of the petitioners alleging a denial of constitutionally guarded procedural rights, North Carolina notes that our Supreme Court addressed itself to each of the questions presented here.

Our Court unanimously held in each instance that what actually happened at the pretrial and trial proceedings were in full compliance with the decisions of this court aimed at obtaining procedural due process.

Accordingly, North Carolina submits there is no conflict between the decisions of our Supreme Court and the decisions of this Court and, therefore, petitioners' petitions for writs of certiorari as to those questions should be denied.

Perusal of the North Carolina Supreme Court's opinions which are attached to the petitions appendices "A" will reveal the accuracy of North Carolina's contention here.

However to assist this court in understanding the questions raised by petitioners, we have attempted to phrase each properly so as to clearly present the question petitioners seek to have this court review. Respondent has grouped them according to the stage of the proceedings below at which the question was raised.

A. At the Pre-trial Stage

1. The petitioner Jarrette's constitutional rights exemplified in Miranda v. Arizona, 384 U.S. 436 (1966) were observed by law officers interrogating Jarrette after his arrest. (Petitioner Jarrette's Question No. 8).

Jarrette contends that his confession given to FBI agents subsequent to his arrest was made without his fully understanding his rights which are exemplified in this Court's decision in Miranda, id.

The evidence demonstrates that Jarrette was intimately familiar with the criminal processes; he being an escapee from prison. He is a high school graduate and he had risen to the office of president of a chapter of the Jaycees. The FBI agents fully advised him of his rights and he signed a waiver of his rights before giving his confession to the law officers. The officers reduced his statements to writing but Jarrette refused to sign them explaining that he knew he would have a lawyer assigned to him upon his return to North Carolina. There is no contention that the written statement of the FBI agent is inaccurate. Nor is there any contention that Jarrette made the statement out of fear or hope induced by the agents.

In Miranda, this Court recognized the policy of the law that has a long standing history in North Carolina. That policy is that extra-judicial confessions made to law officers, if they are to be used as evidence at the trial, must be freely and voluntarily made and could not be as a result of fear of consequences or hope of reward or leniency induced by the officers. Miranda held that the officers must advise the suspect of his rights, and only when he knowingly and intelligently waived them could extra judicial confessions be used as evidence in the trial of the defendant.

Thus, when defendant objects to the introduction of the confession a question of fact is presented to be resolved. The burden of proof is upon the State to prove each element necessary to lay a proper foundation for the admissibility of the confession. This is done on voir dire and evidence is taken to prove the facts necessary for the foundation to be laid. The voir dire is adversary and evidence is adduced by both sides. The trier of fact answers the question of fact thus presented.

The question on appeal is not whether the appellate court would have resolved the issue presented by the evidence in the same manner in which the trial court resolves it, but whether the findings of ultimate fact are supported by substantial and competent evidence.

This was done in Jarrette's case and the entire proceeding was carried out with meticulous care.

Accordingly, North Carolina submits petitioner Jarrette's Question No. 4 contained in his petition should be denied.

2. Constitutional due process is not violated where police do not investigate, ad infinitum, every possible shred of evidence thought by a defendant to have some relationship to the crime with which he is charged. (Petitioner Noell's Question No. 4; Petitioner Henderson's Question No. 14).

Both Noell and Henderson contend that constitutional due process requires law officers assigned to a particular case to affirmatively investigate to its ultimate end, every possible bit and piece of evidence which comes to the officer's attention during the course of the investigation.

In both the Noell and Henderson cases, the law officers were faced with independent and credible evidence to establish the crime in question had been committed. They were also faced with a direct, positive eyewitness, identification evidence, plus independent corroborative evidence, that Noell and Henderson were the ones who perpetrated the crimes established.

Our court noted in the Noell case, 284 N. C. 670 at page 694:

> Police officers are under no duty to take any particular course of action when investigating a crime. Of course, they cannot suppress evidence, Brady v. Maryland, 373 U.S. 83 111 (1963). They are not required, however, to follow all investigative leads and to secure every possible bit of evidence. And their failure to do so is not prejudicial error [citing] People v. Baber, 31 Mich. App. 106, 187 N.W. 2d 508 (1971).

In People v. Baber, id. the Michigan Court held failure to follow all investigative leads did not give rise to a valid claim of a constitutional denial of due process. In accord are State v. Kelly, 110 Ariz. 196, 516 p.2d 569 (1973) and People v. Allen, 351 Mich 535 (1958).

The cases on which petitioners rely are particularly inapposite to the facts in these cases.

Brady v. Maryland, 373 U.S. 83 (1963); Giles v. Maryland, 386 U.S. 66 (1967); and Wardius v. Oregon, 412 U.S. 470 (1973) have nothing to do with the duty of police officers to pursue every imaginable investigative effort, but rather they are concerned with whether the police and prosecution must make available to the defendant discovered exculpatory evidence. Although the interests of the State are best served when justice is done, the defendant has no right to demand that the police pursue every investigative lead in a given case. A criminal accused has a right to trial by a jury and the courts, not by the police. There is no way to know what the evidence belatedly requested in these cases would have shown. The police considered that any evidence to be discovered by these means would be repetitive, cumulative identification testimony, and they were not arbitrary or capricious in that belief. There is nothing in the record to show that counsel requested the accumulation of this scientific evidence or proof that the defendants moved to suppress references to the discovery of the hair and blood stains at the trial.

The State contends the decisions of our Supreme Court in these two cases were properly decided and therefore petitioner Noell's Question No.4and petitioner Henderson's Question No. 14 should be denied further review by this Court.

1. The concept of constitutional due process does not prohibit police use of a "show up" identification procedure during the investigative stage of the case. (Petitioner Henderson's Questions Nos. 1 and 3).

As this court held recently in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972), due process of law does not preclude the police from using a show up in order to obtain an identification of a criminal suspect; nor does the suspect need to have counsel present when the show up takes place before the commencement of adversary proceedings.

Petitioner Henderson (No. 73-6853) objects to the use of the show up identification procedure during the investigative stage of the case and before the commencement of adversary proceedings.

At the trial of the Henderson case, the state offered no evidence respecting the out-of-court identification. The state did offer an in-court identification, and prior to admitting an in-court identification the trial court held a complete voir dire hearing in order to determine whether the in-court identification had an origin adequately independent of the out-of-court identification. In its opinion, the North Carolina Supreme Court held that it was unnecessary for them to reach the question whether the out-of-court identification procedure used in this case was constitutionally impermissable because the trial court had held upon competent evidence that the in-court identification had an origin separate from the out-of-court identification. Nevertheless, the North Carolina Supreme Court very carefully considered the contention of petitioner that the use of a show up identification rather than a lineup identification was impermissable, 285 N.C. at 9-12. Our court cited the case of Kirby v. Illinois, 406 U.S. 682, (1972), for the proposition that the right to counsel at pre-trial identification procedures attaches only "at or after the time that adversary judicial proceedings have been initiated against him." The court said whether a show up identification violates due process depends on the totality of the circumstances. The court then held that the evidence in this case relative to the confrontation, particularly the fact that the confrontation took place a very short time after the crime was committed, led to the result that the out-of-court procedure used here in the investigative stages of the case was not improperly suggestive.

Because no evidence of the out-of-court identification was submitted at the trial, and because the trial court found upon competent evidence, as is to be discussed infra, the objections of the petitioner to the use of the show up present no question for review by the Supreme Court.

Accordingly, the State contends that petitioner Henderson's questions Nos. 1 and 3 should be denied further review by this Court.

8. Constitutional due process in a mandatory death penalty case does not require the state to seat a juror who has testified that because of his personal beliefs he would not return a verdict of guilty, even if satisfied from the evidence beyond a reasonable doubt as to the defendant's guilt. (Petitioner Noell's Question No. 2; Jarrette's Question No. 2).

Petitioner Noell (No. 77-6976, Question No. 2) and Petitioner Jarrette (No. 77-6977, Question No. 2) contend that the examination of the veniremen in each of these cases with respect to their expressed attitudes towards returning a verdict which involved the death penalty led to improper exclusion of jurors.

The case of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968) establishes two things: (1) Veniremen may not be challenged for cause simply because they voice general objection to the death penalty or express conscientious or religious scruple against its infliction; and (2) veniremen who are unwilling to consider all of the penalities provided by law and who are irrefutably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge during the course of the trial may be challenged for cause on that ground. In Witherspoon at 510, this Court said:

> "The only justification the State has offered for the jury-selection technique employed here is that individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge would make death the proper penalty. But in Illinois, as in other states, the jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a Juror's general views about capital punishment play an inevitable role in such decisions."

This language from Witherspoon reflects an important ground of the reasoning in that case -- a line of argument that is no longer applicable in North Carolina following the decisions of this court in Furman v. Georgia, 408 U.S. 238, (1972), and the

Supreme Court of North Carolina in State v. Waddell, 282 N.C. 431, 194 S.E. 2d (1973). No longer do North Carolina jurors decide whether death is "the proper penalty, for the law mandates the penalty of death for the enumerated crimes.

While the supportive argument of the petitioners Woell and Jarrette "that identifiable segments of the community [cannot be systematically excluded from jury panels]" correctly states the law, that proposition is not exactly hand-in-glove with the principle stated by this Court in Witherspoon that even though persons with scruples against the imposition of the death penalty constitute a sizeable group in many communities:

> . . . nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear: (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitudes toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, 391 U.S. 510, fn. 21 at page 522.

Such veniremen as were excluded in these cases, although they may constitute an identifiable segment of the community, have no place on a trial jury, the sole function of which is to find guilt or innocence. Their views respecting the propriety of the death penalty are a mere irrelevancy where the penalty is set by the law, and the jury has no discretion to set the penalty. All that happened in these cases is that the court held in each instance that such veniremen could be excluded.

Even an examination of those portions of the voir dire examination quoted in the petitions in these cases discloses that the excluded jurors stated that they were irrevocably committed to vote against a verdict requiring the imposition of the death penalty, without regard to what the evidence might show. The North Carolina court, in each case, observed correctly that these jurors had made up their minds before the trial began. The question is one of the application of settled law to familiar facts, and it is not sufficiently important to require review.

5. Constitutional due process does not require the state to furnish a transcript of the voir dire examination of the jury when defendant has not requested such a transcript. (Petitioner Honeycutt's Question No. 2).

Petitioner Honeycutt (No. 73-7032, Question No. 2) claims that constitutional due process requires the state to furnish a transcript of the voir dire examination of prospective trial jurors in a capital case even in the absence of a request.

The question is not properly before the Court because for all that appears in the record the question is raised for the first time in the petition for certiorari. The question was niether raised in nor passed upon by the Supreme Court of North Carolina, nor does it appear in the record that a request was made to the trial court that a transcript be made and made available to the petitioner.

As this Court said in Williams v. Georgia, 349 U.S. 375, 382 (1954), "A state procedural rule which forbids the raising of a federal question at late stages of the case, or by any other than a prescribed method, has been recognized as a valid exercise of State power." See also, Chambers v. Mississippi, 410 U.S. 284, at 308 et.seq. (1973) (opinion of Rehnquist, J.).

The rule of appellate practice in North Carolina is to the effect that the "Supreme Court will not decide questions which have not been presented or adjudicated in the court below, especially questions relating to the constitutionality of a statute or an act of Congress". 1 Strong's, N.C. Index 2d, p. 106 (1967), and cases there cited.

There is a second reason that this Court should not grant certiorari to question No. 2 raised by the petitioner, Honeycutt, as to the requirement of a transcript of the voir dire examination of jurors. It is not the practice in North Carolina to make a transcript of the voir dire examination of jurors unless the transcript is requested by the petitioner. But if such transcript is requested, it is granted as a matter of course. State v. Fowler, 285 N. C. 90, 103-107 (1974). The

Supreme Court of North Carolina in the Fowler case said, 285 N. C. at 107:

> It is the primary duty of defense counsel to prepare and docket a true and adequate transcript of the record of the case on appeal in a criminal case. State v. Fox, 277 N. C. 1, 175 S.E. 2d 561 (1970); State v. Roux, 263 N. C. 149, 139 S.E. 2d 189 (1964); G.S. 15-180; G.S. 1-282. It is also the duty of the solicitor to scrutinize the copy that the appellant serves upon him. If it contains errors or omissions, it is the solicitor's responsibility to file exceptions or countercases. State v. Fox, supra. If, as in the present case, defense counsel desires to take exception to the act of the Court in excusing a prospective juror, he should either enter into a stipulation with the State setting out in detail the reason for excusing the juror, or he should include a transcript of the voir dire examination as to that juror in the case on appeal. He should not take exception to his own failure to prepare and docket a true and adequate transcript of the record in the case on appeal. Such action is not approved.

The principle underlying the right to counsel case Gideon v. Wainwright, 372 U.S. 335 (1963), is that the criminal defendant should have at his disposal a trained advocate who knows the law and is able to adequately preserve his rights. All that has happened in this case is that Honeycutt's counsel failed to request that a transcript of the voir dire examination be made and failed to put a transcript of that voir dire examination into the record. In no sense of the word has the State of North Carolina denied this petitioner a transcript of the voir dire examination of jurors in his case in order that he might preserve his rights under Witherspoon v. Illinois, supra..

6. Constitutional due process does not require that a jury include black members where the defendant is a black when there is no systematic exclusion of blacks from jury service. (Petitioner Noell's Question No. 5).

Petitioner Noell, (No. 73-6876, Question No. 5) challenges his conviction on the grounds that the State used its peremptory challenges in such a way that all the black veniremen were ultimately excluded from the petit jury.

The record demonstrates that the black veniremen were excluded for cause, because they knew the defendant or his family, or because they further stated that their knowledge of defendant and his family would prevent them from being able to return a fair and impartial verdict upon the evidence presented. A very few of the black veniremen were excluded because of their expressed attitudes toward returning a verdict which might entail the imposition of capital punishment. Only one black venireman was excluded peremptorily by the state.

In State v. Peoples, 131 N.C. 784, 42 S.E. 814 (1902) the North Carolina Supreme Court held that the North Carolina Constitution, Art. I, § 28 requires the sustaining of a motion to quash an indictment of a Negro who proves that the members of his race have been systematically excluded from the juries of the county in which he was indicted. The North Carolina courts have consistently followed that principle to the present, State v. Knight, 269 N.C. 100, 152 S.E. 2d 179 (1967).

As the North Carolina Supreme Court said in this case, 284 N.C. at 683, 202 S.E. 2d 750, 759:

> Defendant's mere showing that all Negroes in this case were challenged by the solicitor is not sufficient to establish a prima facia case of an arbitary and systematic exclusion of Negroes. The record is silent about any prior instances in which the solicitor challenged such arbitary and systematic exclusion, and he has failed to carry that burden."
>
> A defendant has no right to be tried by jury containing members of his own race or even to have a representative of his own race to serve on the jury. Defendant does have a right to be tried by a jury from which members of his own race have not been systematically and arbitarily excluded. The burden is upon the defendant, however, to establish racial discrimination in the composition of the jury. State v. Cornell, 281 N.C. 20, 187.

In Swain v. Alabama, 380 U.S. 202, 222, (1965) this Court in discussing the question of peremptory challenges stated:

> "In the light of the purpose of the peremptory system... we cannot hold that the Constitution requires examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the Court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.

To impute to the solicitor the motive of racial discrimination in the use of his peremptory challenge to one black is wholly unsupported by the record. It must be presumed that he used his challenge to obtain a fair and impartial jury, as our Supreme Court held.

Accordingly, the State contends that petitioner Neal's Question No. 5 should be denied further review by this Court.

7. Constitutional due process does not require a change of venue for the trial of a criminal case merely upon the showing of wide publication of the crime involved. (Petitioner Jarrette's question No. 8).

Petitioner Jarrette (No. 77-1027, question No. 8) contends he was denied due process of law in that the trial court did not grant a change of venue on the grounds of prejudicial pre-trial publicity.

Jarrette's evidence consisted of six affidavits, in substance, that the affiants had read numerous newspaper accounts concerning the charges against Jarrette; that they had seen various television news programs concerning the crimes with which Jarrette was accused; and that due to that publicity they had formed the opinion that Jarrette was guilty.

The state's evidence consisted of testimony of nine witnesses who testified, in substance, that they believed that the petitioner could receive a fair trial in Union County.

The trial court found:

> "[w]hat due to the nature of the Jaycee program under which [Jarrette] was being allowed to participate, he received statewide publicity, the Court being of the opinion that the questions presented by the motion can and shall be presented to each juror as they are summoned to the end that no one shall be allowed to serve who has formed and expressed an opinion as to the defendant's guilt on any one of the charges to which he stands trial, and that each prospective juror is questioned by counsel for the defendant as to whether or not he can give the defendant a fair and impartial trial based solely upon the evidence as it comes from the witness stand in the course of the trial and based on nothing else,. . ."

Each prospective juror was examined extensively on voir dire prior to being seated. The twelve finally seated each testified they had no fixed opinion of Jarrette's guilt or innocence and could give both the State and Jarrette a fair verdict based only upon the evidence given in open court.

All that has happened in this case, and all that the cases in this Court require, is that the trial judge conduct a hearing respecting the motion for change of venue or change of venire, fairly consider all the evidence, and based on that evidence find that the defendant can receive a fair trial before an unbiased jury.

Under N. C. Gen. Stat. §1-88, these rotions were addressed to the discretion of the trial court. State v. Blackmon, 280 N. C. 82, 185 S.E. 2d 133 (1978). The cases in this Court indicate that on the basis of that statute and the evidence the trial court properly observed due process. Irvin v. Dowd, 366 U.S. 717 (1960); Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966); Groppi v. Wisconsin, 400 U.S. 505 (1971).

According , the State submitspetitioner Jarrette's question No. 8 should not be further reviewed by this Court.

F. At the Trial Stage.

1. The constitutional concept of due process does not require the exclusion of evidence of an independent in-court identification of the defendant as the perpetrator of the crime by the rape victim simply because the victim had previously identified the defendant as the perpetrator in a "show up" during the investigation of the crime by the law officers (Petitioner Henderson's Questions Nos. 2,4, and 5).

Petitioner Henderson (77-6852 Questions Nos. 2,4 and 5) contends his constitutional rights to due process were violated because he was subjected to a "show up" identification procedure in the investigation stage of the trial and he contends that this act of the law officers made the in-court identification by the same eyewitness (the rape victim) inadmissible at the trial.

Our Court noted the similarity of the present case with the

recent case of Neil v. Biggers, 409 U.S. 188. In the Neil case, this court noted:

> " ...the victim spent a considerable period of time with the assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon out doors, and at least twice, once in the house and later in the woods, faced him directly and intimately ... her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, ... was more than ordinarily thorough. she had 'no doubt' that the respondent was the person who raped her ... she testified ... that there was something about his face 'I don't think I could ever forget."

The North Carolina Supreme Court then noted a number of factors to be considered in evaluating the likelihood of mistaken identification. These are: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, (5) the length of time between the crime and the confrontation.

On the trial court's voir dire hearing respecting the admissibility of the in-court identification the only evidence offered was the testimony of Judith Strader, the victim of the crime.

On the voir dire examination, Miss Strader positively identified the petitioner as her assailant. She testified that the lighting conditions surrounding her trailer at the time of her attack were a light that had been left on in her living room, three street lights near her trailer, one of which shone almost directly into her bedroom window, and a half-full moon. She stated that the defendant had been in her bedroom for about an hour and that they talked for about thirty to thirty-five minutes after the attack. She at that time observed the defendant carefully because she "was looking for facial characteristics, things I might be able to pick out." She stated that her identification of the petitioner was based on "his hair line, length of hair, eyebrows, and lips" and that he had been wearing a shirt, trousers, and laced boots. She stated that she had no

doubt whatsoever about the defendant's being the man who had been in her trailer on the night of the rape, and she based her identification " ... on the face that I saw that night and the face, you don't forget, I won't ever forget it ..."

Our Court then stated the rules governing the admissibility of in-court identifications as stated in State v. Tucale, 288 N.C. 515, 201 S.E. 2d 898:

> "When the admissibility of in-court identification testimony is challenged on the ground that it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the test of admissibility. When the facts so found are supported by competent evidence, they are conclusive on an appellate court. State v. McVay, and State v. Simmons, 277 N.C. 810, 817, 177 S.E. 2d 878, 882 (1970); State v. McVay and State v. Simmons, 279 N.C. 220, 232, 181 S.E. 2d 655, 655 (1971); State v. Morris, 279 N. C. 477, 481, 183 S.E.2d 638, 637 (1971)."

In the Neil case, supra, this court said at 198:

> "Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is a very substantial likelihood of irreparable misidentification.' Simmons v. United States, 390 U.S. at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself."

Unless this Court is willing to state a per se rule of inadmissability of identification evidence obtained through show up procedures which take place following the decision in Stovall v. Denno, 388 U.S. 293 (1967) then the question as to the admissibility of the identification here poses no substantial question for review by this Court.

2. The constitutional concept of due process does not require a mistrial where a witness spontaneously and voluntarily gives evidence of a non-inflammatory nature and the trial judge immediately orders the testimony stricken and instructs the jury to disregard the spontaneous utterance of the witness. (Petitioner Noell's Question No. 4; Petitioner Crowder's Question No. 3).

Petitioner Crowder, (No. 73-6878, Question No. 2) and Petitioner Noell (No. 73-6876, Question No. 4) contend that they were denied due process because of prosecutorial misconduct.

In the Noell case the allegation of prosecutorial misconduct is based on the following examination of the witness Mary Ford:

> Q. (Mr. Pearce) Mrs. Ford, were any tests conducted there at the hospital on Miss Dicenzo?
> A. (Mrs. Ford) Yes; there were.
> Q. (Mr. Pearce) What were they, if you know of your own knowledge?
> A. (Mrs. Ford) There were slides done, surgical secretion, bubble secretion, which is normal procedure in any normal rape case.

In the Crowder case, the following transaction forms the basis for the allegation of prosecutorial misconduct:

> "Jacquelyn Otelie Bryant, sister of the deceased, testified that the defendant had been dating the deceased from July or August, 1972 until the date she was shot. The solicitor then asked the witness if she knew of her own knowledge where defendant and deceased met. Defendant's objection to that question was overruled and the witness replied: "She met him in Caledonia in prison." Objection was then sustained and the jury was instructed not to consider the answer. At defendant's request the jury was excused and defendant moved for a mistrial on the ground that the answer was so highly prejudicial the error could not be cured by the Court's instruction." (285 N.C. at 47).

The objection on constitutional grounds to either of these evidentiary rulings was first made in the petitions in this Court for certorari.

The Supreme Court of North Carolina dealt with both these instructions to the jury to disregard the evidence. In the Noell case, our court said (284 N.C. at 688, 202 S.E. 2d at 762), when:

> . . .the jury is instructed to disregard such evidence is cured. It is presumed that the jurors followed the court's instructions in this case to disregard this evidence and to dismiss it from their minds. Justice Sharp in State v. Moore, 276 N.C. 165, 171 S.E. 2d 853 (1970) quoted with approval from State v. Ray, 212 N.C. 225, 198 S.E. 20 882 (1938) wherein it was stated: ...[o]ur system for the administration of justice through trial by jury is based on the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instruction of the court, and are presumed to have done so. Wilson v. Mfg. Co., 120 N.C. 98, 26 S.E. 628."

In the present case the court's prompt action in sustaining defendant's objection, allowing his motion to strike, and instructing the jury not to consider what the surgical nurse told her and to dismiss that from their minds - was sufficient to eliminate any possible prejudice to defendant."

Petitioner Crowder contends that when the District Attorney asked the witness if she knew where the deceased met defendant and the witness answered "she met him in Caledonia, in prison," then the only inference to be drawn is that defendant was in prison as a convict and the District Attorney knew that to be a fact and sought to get that answer before the jury.

Such inferences just don't arise. First, the District Attorneys' questions only called for a "yes" or "no" answer. Second, there is no more reason to believe the defendant was a convict than that the decedent was a convict. Third, there is no reason to believe that either were convicts instead of employees. Fourth, there is not the slightest hint in the record that the District Attorney knew: (a) where they met or (b) what the witness answer would be.

Petitioners ask this Court to establish as a rule of law, absent evidence to the contrary, a presumption of misconduct on the part of officers of the Court when the officer represents the public against a criminal.

This is a novel concept indeed. For as Justice Ervin (now U.S. Senator, D.N.C.) said in State v. Gaston, 236 N.C. 499 at page 502:

> ...[w]e merely apply the presumption that in the absence of evidence to the contrary, courts are bound to presume that the acts of public officers are in all respects regular. State v. Wood, 175 N.C. 809, 95 S.E. 1050; State v. Bridgers, 87 N.C. 562.

3. Constitutional due process does not require the trial judge to instruct the jury that if the jury convicts the defendant of rape the punishment shall be death, where neither the judge nor the jury have any discretion as to punishment upon conviction of a capital crime (Petitioner Henderson's Question Nos. 11 & 12).

Henderson contends he was denied due process because the trial judge did not instruct the jury that if they found him guilty of rape, the sentence would be death.

The State's contention is that in State v. Henderson, 285 N. C. 1, 203 S.E. 2d 10 (1974) the North Carolina Supreme Court properly applied the general rule:

> " ...[T]hat the trial judge has the sole responsibility to render judgements upon jury verdicts upon the limits prescribed by statute. The sole responsibility of the jury is to decide the guilt or innocence of the accused without being hindered by the quantum of punishment possible, probable or certain upon conviction. State v. Davis, 238 N.C. 252, 77 S.E.2d 630; State v. Howard, 222 N.C. 291, 11 S.E.2d 917." (285 N.C. at p. 20).

This decision is further consistent with the language of our court in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973):

> "The punishment to be imposed for these capital felonies is no longer a proper subject for an instruction by the judge."

This being the general rule, the Supreme Court of North Carolina has allowed for an exception to it only in the presence of "compelling reasons". Our court in State v. Rhodes, 275 N.C. 594, 160 S.E.2d 846, a case decided before Furman (and in North Carolina, Waddell), observed that:

"In this jurisdiction, except in one classification, the presiding judge fixes the punishment for a convicted defendant within the limit provided by the applicable statute. The exception is capital cases in which the jury may reduce the penalty from death to life imprisonment.... in all other instances, the jury has performed its function and discharged its duty when it returns its verdict of guilty or not guilty... 275 N.C. 584, 587-588,

...In the absence of some compelling reason which makes disclosure as to punishment necessary in order to keep the trial on an even keel and to insure complete fairness to all parties, the trial judge should not inform the jurors as to the punishment in non-capital cases. If information is requested he should refuse it and explain to them that punishment is totally irrelevant to the issue of guilt or innocence. When, however, such information is inadvertently given, the error will be evaluated like any other. (275 N.C. at p.592).

Petitioner relies on State v. Britt, 285 N.C. 256 (1974) as an instance in which the right was recognized. However, Britt is clearly distinguishable from Henderson. As our court made clear in Britt:

"Thus in a capital case if the jury appears to be confused or uncertain, the trial judge should act to alleviate such uncertainty or confusion. Specifically, if the trial judge observes that the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence, in our opinion, sufficient compelling reason exists to justify his informing the jury of the consequence of the possible verdicts. (285 N.C. at page 272).

In [the Britt] case, when the jury returned the verdict of "first degree murder, with mercy," it became apparent that the jurors were confused as to the law and as to their duties as jurors. At that point the trial judge should have informed them that under the existing law, neither the jury nor the Court had any discretion as to punishment if the jury returned a verdict of guilty of first degree murder." (285 N.C. at p. 272).

The Court reinforced its view of the particularly compelling nature of Britt with the following language:

"The need for such action on the part of the trial judge is underscored by the fact that on two occasions the trial judge used language in the presence of the jury which might well have left the jury with the erronous impression that he had some discretion in imposing punishment in the event the jury returned a verdict of guilty of murder in the first degree. Further the gravity of this case, and the apparent confusion and uncertainty among the jurors when the unaccepted verdict was returned, demanded more clarification as to possible verdicts than the statement: 'The verdict must be either guilty of murder in the first degree or guilty of what ever you find him guilty of.'" (Emphasis added). (285 N.C. at p.273-3).

It should be noted that our court in Britt did not require the punishment to be administered should be spelled out, but only that the judge make it clear to the jury that neither he nor they had any discretion in this regard should they return a verdict of guilty of murder in the first degree.

In Henderson, no suggestion had been made nor is it apparent from the record that the judge in his instructions gave an erroneous impression to the jury. Further, it is clear that during the deliberations, when some question did arise in the minds of the jurors as to "recommendations", the trial judge made the role of the jury clear in unambiguous terms. Henderson and Britt are distinguishable, in that in Henderson the general rule was properly called for and applied rather than its exception as defined in Britt.

Accordingly, further review of Henderson's question Nos. 11 and 12 should be denied.

4. Constitutional due process does not require that the state permit defense counsel to argue the propriety of the death penalty to the jury when neither the judge nor the jury has any discretion as to punishment upon conviction of a capital crime (Petitioner Dillard's Question No. 2).

Petitioner Dillard (No. 73-6675, Question No. 2) contends he was denied due process because his counsel was not permitted to argue the propriety of the death sentence to the jury.

The State contends the rule that counsel for the defendant may not argue the question of punishment to the jury logically follows the general rule that the determination of punishment is not a matter for the jury. To permit otherwise would be to condone pleas of passion and to encourage the jury to ignore the law as it is, to abandon its role as trier of fact, and thus to act instead as a legislature.

This general rule as applied in Dillard must be contrasted with the application of its long standing statutory exception in Britt thus stated:

"Such an argument to the jury would be improper for the reason that the law of this State is otherwise. Counsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged. He may not, however, state the law incorrectly or read to the jury a statutory provision which has been declared unconstitutional. See, State v. Banner, 149 N.C. 519, 526, 63 S.E. 88. Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but find him guilty of a lesser offense or acquit him entirely.

State v. Dillard, supra, did not hold that counsel, in his argument to the jury, cannot inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge. Rather Dillard stands for the proposition that counsel may not argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the imposition of the death penalty. (State v. Britt, 285 N.C. at p. 277).

The petitioner's claim that the Court, by denying his request to argue the question of punishment, deprived the defendant of his right to recite the law as it is, as permitted in Britt, ignores the fact that the petitioner could have easily, and with considerable case and statutory precedent, so read the applicable statute. In this case the petitioner either failed to recognize or otherwise ignored this distinction and our Court should not be required to "read between the lines" of such a request. See State v. Crisp, 288 N.C. 407, 98 S.E. 2d 802, 67 A.L.R. 2d 236; Annot. 67 A.L.R. 2d 285.

Accordingly, petitioner Dillard's question No. 2 should be denied further review by this Court.

5. Constitutional due process does not require the trial judge to instruct the jury as to lesser included offenses when the charge laid in the indictment and all of the state's evidence introduced at trial, tend to prove that only the capital offense, if any, was committed. (Petitioner Henderson's Question No. 11).

The contention of petitioner Henderson in his Question No. 11 seems to be addressed to the failure of the trial court to charge the jury with respect to the lesser included offenses of burglary and rape.

As our Court said in this case, 285 N.C. at 23, 203 S.E.2d at 24:

"The necessity of instructing a jury as to an included crime of lesser degree than the one charged arises only when there is evidence supporting the included crime of lesser degree. State v. Watson, 283 N.C. 383, 196 S.E.2d 12; State v. Bryant, 280 N. C. 551, 187 S.E.2d 111; State v. Carnes, 279 N.C. 589, 184 S.E.2d 235; State v. Murry, 277 N.C. 197, 176 S.E.2d 738; and State v. McNeil, 280 N.C. 159, 185 S.E.2d 156]."

It is difficult to understand the petitioner's contention that he was denied due process of law because the only evidence introduced by the prosecution went to the proof of the capital crimes of burglary and rape. The jury thus had to find the petitioner guilty or not guilty of those crimes and those crimes alone, rather than the more numerous conviction options which would have been open to the jury had there been instructions on the lesser included offenses. The state introduced evidence tending to show the guilt of the petitioner of only two crimes, and the State had the burden of proving beyond a reasonable doubt each and every element of those two crimes, including that Henderson was the perpetrator thereof.

It seems that petitioner's argument regarding the defense of alibi is confused with something else. It is settled in North Carolina that the defendant is entitled to an instruction on the defense of alibi whether he requests it or not. State v. Vance, 277 N.C. 385 177 S.E.2d 389 (1970); State v. Spencer, 256 N.C. 487, 124 S.E.2d 175 (1962). The burden of proving the defense of alibi does not rest on the defendant. In State v. Walston, 259 N.C. 385, 130 S.E. 2d 636 (1963) the court stated at page 386:

"The burden of proof rests upon the State to establish beyond a reasonable doubt all elements of the offense charged, including the defendant's presence at the place of the crime, at the time of its commission, where that is essential to his guilt."

In State v. Vance, supra. at 387 our Court said:

"An accused, who relies on an alibi does not have the burden of proving it. It is incumbent on the State to satisfy the jury on the whole evidence that such accused is guilty. If the evidence of an alibi, in connection with all other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an acquittal."

Finally, the question as posed fails to raise a Federal constitutional question. The leading case in the Fourth Circuit Court of Appeals on this point is Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960). The language of the Court in that case is most apropos to the question raised here, 283 F. 2d 802:

> The points made in the present proceeding all pertain to state law and in the context of the trial we find no indication of fundamental unfairness. We express no opinion as to the state court's resolution of the issue raised. Even if we were to disagree, we could not intervene..., when the alleged errors are of a character that cannot reasonably be said to involve a deprivation of constitutional rights. Normally, the admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented."

Accordingly, the State contends petitioner Henderson's question No. 13 should not be further reviewed by this Court.

C. <u>At the Appellate Stage</u>.

1. The concept of constitutional due process does not require that the state assume the burden of proving the negative of any issue raised by a defendant on appeal in a capital case. (Petitioner Henderson's Question No. 10).

Petitioner Henderson (73-6853 Question No. 10) contends that because of the severity of the death penalty the burden of proving that state officials have not acted in an arbitrary, capricious, or discriminatory manner toward the defendant should fall upon the state on appeal and absent such proof, constitutional due process requires the reversal of his conviction.

As the cases cited by Henderson in his petition simply don't stand for any such proposition of law whether constitutional or otherwise, the contention is difficult to respond to.

The existing law in North Carolina is that it will be presumed that a public official in the performance of an official duty has acted in good faith and in accordance with the law and the authority conferred on him. The burden is upon the party

asserting the contrary to overcome the presumption by competent and substantial evidence, Housing Authority of Wilson v. Wooten, 257 N.C. 758, 126 S.E.2d 101 (1962).

Allegata without probata won't prevail in the Courts of North Carolina and should not prevail in this Court:

> . . .The ends of criminal justice would be defeated if judgments [of courts] were to be founded on a partial or speculative presentation of the facts. . . . U.S. vs. Nixon, ___U.S.___ 41 L.Ed. 2d at p. 1068 (1978).

Accordingly, the State contends Henderson's question No. 1 should not be reviewed by this Court.

CONCLUSION

The State of North Carolina, respondent in each of the captioned cases, respectfully requests this Court deny each the petitioners' petitions for writs of certiorari to the Supreme Court of North Carolina except that respondent has no objection to a review of the question whether capital punishment is cruel and unusual per se.

Respectfully submitted this the 29th day of September, 1978.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a Deputy Attorney General licensed to practice law in the State of North Carolina and the United State Supreme Court.

That on September 20, 1974, he served a copy of the attached RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA to the persons hereinafter named, at the places and addresses stated below by depositing said envelope and its contents in the United States mail at Raleigh, North Carolina.

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974
No_____

ALTON JAMES HENDERSON	)	In Forma Pauperis
	)	
v.	)	From North Carolina
	)	
STATE OF NORTH CAROLINA	)	State Court Decision

REPLY BRIEF -- PETITION FOR CERTIORARI

Pursuant to Rule 24 Petitioner herewith files his Reply Brief:

Argument Replied to: That Petitioner's Question No. 7 is not a federal question because the severability of the statute is a matter of local law. (Respondents Brief p. 18)

Before the question of severability is reached there is first the question of which twin has to die -- the death requirement or the jury discretion requirement:

> "...while the resolution of the question of severability, which followed the announcement that the proviso was invalid, certainly should have been guided by manifestations of legislative intent, the determination of which part of the statute was invalid was a question, not of legislative intent, but rather of the application of FURMAN." (52 N.C.L. Rev. 875 at 881) (italics added).

Before FURMAN was decided three propositions were possible: (1) that the death sentence requirement was invalid, (2) that the jury discretion requirement was invalid, or (3) that neither was invalid alone but that the two cannot stand together and the Constitution is indifferent as to which must fall.

After FURMAN was decided the North Carolina Court held that proposition #2 was established, and that the discretionary proviso was the sole casualty. Whether that interpretation is correct is a federal question.

Respectfully submitted this 26 day of September 1974.

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